

No. 12892

United States
Court of Appeals
for the Ninth Circuit.

SIGNAL MANUFACTURING COMPANY and
CHARLES SCHNEIDER,

Appellants,

vs.

THE KILGORE MANUFACTURING COMPANY, a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 190)

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Columbus, Ohio.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 7693B

THE KILGORE MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

BILL OF COMPLAINT

Now comes The Kilgore Manufacturing Company, plaintiff in the above-entitled action, and complains of Signal Manufacturing Company, defendant herein, and for cause of action alleges:

I.

That plaintiff, The Kilgore Manufacturing Company, is a corporation organized and existing under the laws of the State of Ohio, having its principal place of business at Westerville, in the County of Franklin and State of Ohio:

II.

That defendant, Signal Manufacturing Company, is a corporation organized and existing under the laws of the State of California, and has a regular and established place of business [2*] at 524 West Pico Street, in the City of Los Angeles, County of Los Angeles and State of California, of which place

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in the Southern District of California, Central Division, among others, the acts hereinafter complained of as infringements and other unlawful acts have been done and are being done by the said defendant.

III.

That the jurisdiction of this Court arises under and by reason of the patent laws of the United States, and the diversity of citizenship of the parties in suit where the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

IV.

On February 20, 1934, United States Letters Patent No. 1,947,834 were duly and legally issued to Louis L. Driggs, Jr., and Henry B. Faber for an invention in Flare Signal, and thereafter by assignments in writing recorded in the Records of Transfer of the United States Patent Office, in Liber E209, Pages 263 and 267, plaintiff herein The Kilgore Manufacturing Company, is the owner of the entire right, title and interest in and to said Letters Patent No. 1,947,834 and the invention described and claimed therein, and has the right to collect for past infringement thereof. A copy of said Letters Patent No. 1,947,834 is attached hereto and marked "Plaintiff's Exhibit 1."

V.

Defendant, Signal Manufacturing Company, has for a long time past and still is infringing said Letters Patent No. 1,947,834 by manufacturing, using

and selling flare signals embodying the invention patented in said Letters Patent, and will continue to do so unless enjoined by this Court. A sample of one of the devices manufactured and sold by defendant is filed herewith and marked "Plaintiff's Exhibit 2." [3]

VI.

Defendant is equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and threatens to continue to manufacture, use and sell said flare signals, and in so manufacturing to practice the patented invention.

VII.

Plaintiff has for a long time past and still is manufacturing flare signals embodying the invention patented in plaintiff's Letters Patent No. 1,947,834 and has placed the required statutory notice on the flare signals that it manufactures, and defendant has had actual notice of said Letters Patent.

For a Second Cause of Action

VIII.

Plaintiff repeats and realleges as a part of this cause of action each and all of the allegations contained in Paragraphs Nos. I to VII of the First Cause of Action, with like effect as if herein fully realleged, and incorporates herein all the facts therein set forth.

IX.

Plaintiff has been engaged in the manufacture and sale of flare signals for many years and has

specialized throughout said years in the manufacture of a unique type flare signal embodying and containing not only the improvements disclosed in Letters Patent No. 1,947,834 aforesaid, but also embodying and containing certain non-functional features of design and style which, in association with the improvements attained by practicing the invention disclosed in said Letters Patent, give plaintiff's flare signals a characteristic of unique eye appearance, well known to the trade throughout the United States and foreign [4] countries, and this uniqueness of design is indicative of the product of the said plaintiff.

X.

Plaintiff established a very large and profitable business in flare signals having non-functional features of design and style, has spent large sums of money in promoting the use of and in advertising said flare signals embodying said non-functional features of design and style, and has maintained a quality product which is so recognized by the trade; that by reason of the quality of the product sold by plaintiff with said non-functional features, an enormous good will and business reputation of high value has been built and recognized by the trade in the products manufactured by plaintiff; that by reason of the large business of said plaintiff, its extensive promotion and advertising in the manufacture and sale of flare signals having the said characteristic eye appearance, said feature in said flares acquired a secondary meaning in the trade, in the United States and foreign countries, and when in-

corporated in flares, is indicative of flare signals manufactured and distributed by the plaintiff or in some way backed by the reputation and good will of the plaintiff.

XI.

That defendant, well knowing the facts hereinbefore set forth, adopted not only the invention patented by said Letters Patent No. 1,947,834, but adopted all of the non-functional features of plaintiff.

XII.

That the flare signals manufactured by defendant, although simulating the flare signals manufactured by plaintiff, nevertheless are of inferior workmanship and quality. [5]

XIII.

That plaintiff has for many years enjoyed the exclusive use of the non-functional features, design and style of its flare signals and the trade and public have recognized, acknowledged, acquiesced in said rights therein; that by reason of the premises, the use by defendant of these simulating features will result in embarrassment, annoyance, financial injury and damage to the plaintiff, of its established rights in said non-functional features, design and style, and will cause confusion in the trade, unless enjoined by this Court.

XIV.

That the acts complained of as aforesaid constitute unfair competition, unfair methods of competition in trade, illegal appropriation of plaintiff's property, and are accordingly unlawful.

Wherefore, plaintiff prays:

1. That a preliminary and final injunction issue against further infringement of said Letters Patent No. 1,947,834 by defendant and those controlled by defendant.
2. That defendant, its agents, officers, servants, employees, and those acting in concert therewith, be enjoined during the pendency of this action and permanently thereafter from the following:
 - (a) Practicing the invention of said Letters Patent No. 1,947,834;
 - (b) Making, using, selling, appropriating or causing the appropriation of flare signals embodying the non-functional features of the flare signals of plaintiff so as to prevent the flare signals manufactured and sold by defendant [6] from simulating the eye appearance of the flare signals manufactured and distributed by plaintiff;
 - (c) Doing any act or thing that would enable defendant to substitute the flare signals of its manufacture for the flare signals manufactured by plaintiff; and
 - (d) Unfairly competing with the plaintiff in any manner whatsoever.
3. That the defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement and/or by reason of the unlawful acts of defendant and to account and pay over to plaintiff all of the gains, profits and advantages derived by defendant from its infringements and an increase of such damages

as provided by law, and an assessment of costs of this action against defendant.

4. That defendant be required to deliver to the Marshal, to be impounded during the pendency of this action, all flare signals which have the eye appearance of the flare signals of plaintiff and to deliver to the Marshal, to be impounded during the pendency of this action, all copies in its possession or under its control of literature or advertising material illustrating or in any way describing flare signals having the eye appearance of those of plaintiff.

5. That plaintiff have such other and further relief as is just.

Los Angeles, California, October 15, 1947.

THE KILGORE MANUFACTURING COMPANY,

By /s/ WARREN H. F. SCHMIEDING,
Attorney for Plaintiff.

/s/ HAROLD W. MATTINGLY,
Attorney for Plaintiff.

/s/ WAYNE S. GERBER,
Of Counsel.

[Endorsed]: Filed Oct. 16, 1947. [7]

[Plaintiff's Exhibit No. 1, Patent No. 1,947,834 — L. L. Driggs, Jr., is contained in Vol II, Book of Exhibits, page 191.]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, Signal Manufacturing Company, and in answer to the Bill of Complaint filed herein, admits, denies and alleges as follows:

I.

The defendant is without knowledge as to the allegations of Paragraph I, except as alleged therein, and therefore denies the same and leaves plaintiff to strict proof thereof.

II.

The defendant admits that it is a corporation organized and existing under the laws of the State of California, and has a regular and established place of business at 524 West Pico Boulevard, in the City of Los Angeles, County of Los Angeles, [15] and State of California, in the Southern District of California, Central Division, but denies that it has at that or any other place committed acts of infringement or other unlawful acts.

III.

Defendant admits that the jurisdiction of this Court as to the alleged causes of action set forth in the complaint arises under and by reason of the patent laws of the United States and the diversity of citizenship of the parties, but denies that the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

IV.

In answer to Paragraph IV, the defendant admits that a purported patent No. 1,947,834 was issued to Louis L. Driggs, Jr., and Henry B. Faber; denies that said patent covered any patentable invention in Flare Signal or otherwise; defendant is without knowledge of the remaining allegations of said Paragraph and therefore denies same.

V.

Defendant denies that it has for a long time past or still is infringing said Letters Patent No. 1,947,834 by manufacturing, using or selling flare signals embodying the invention patented in said Letters Patent, or will continue to do so unless enjoined by this Court.

VI.

Defendant admits it is equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and intends to continue to manufacture and sell but not use said flare signals, but denies that in so doing it is practicing a patentable invention. [16]

VII.

Defendant admits receipt of a notice in writing alleging that it has infringed said Letters Patent, but defendant is without knowledge as to the remaining allegations of said paragraph and hence denies the same.

VIII.

For a Further, Separate and Affirmative Defense, defendant alleges that said Letters Patent

No. 1,947,834, and particularly claims 1 to 11, inclusive, and 15 and 16 thereof, which claims have been designated by plaintiff in a written notice dated November 18, 1947, as the claims upon which it will rely, is invalid and of no effect in law:

(a) because the alleged inventions and improvements and all material and substantial parts thereof set forth and claimed in said pretended Letters Patent No. 1,947,834 have been patented and described in the following patents and printed publications prior to the supposed invention or discovery thereof by said Louis L. Driggs, Jr., and Henry B. Faber:

Prior Patents and Printed Publications

Detewiller	79,963	7/14/1868
Amici	41,173	1/ 5/1864
Wood	132,227	10/15/1872
Leet et al.....	208,247	9/24/1878
Bogardus	216,552	6/17/1879
Piffard	383,984	6/ 5/1888
Ulrich	777,319	12/13/1904
Murphy	987,590	3/21/1911
Sweeley	1,073,940	9/23/1913
Roger	1,216,364	2/20/1917
Bergman	1,318,719	10/14/1919
Paulus et al.	1,641,549	9/ 6/1927
Driggs et al.	1,712,382	5/ 7/1929
Driggs et al.	1,712,383	5/ 7/1929
Faber et al.	1,785,770	12/23/1930
Rollet (French)	496,832	11/18/1919

Wilder (British)	128,976	7/10/1919
Pain (British)	7,363	11/29/1917
Brandon (British)	2,257	1869
Hookham (British)	22,081	10/28/1893
Chamberlin (British) ...	21,266	10/ 5/1892
Roth (German)	288,654	4/22/1920
Military Pyrotechnics, Faber		1919

Vol. 2, pages 150-156.

and by other patents and printed publications which are not at present known to this defendant but which this defendant requests it be allowed to insert by amendment when ascertained;

(b) because the alleged invention set forth in said Letters Patent No. 1,947,834 was not novel and patentable when alleged to have been produced by said Louis L. Driggs, Jr., and Henry B. Faber, but that said Flare Signal described and claimed in said Letters Patent, and particularly the claims thereof here relied on by plaintiff, namely, claims 1 to 11, inclusive, 15 and 16, had been known to others in this country prior to the alleged invention thereof by said Louis L. Driggs, Jr., and Henry B. Faber, and particularly by the patentees and persons specified in subdivision (a) hereof;

(c) because the specification and claims of said Letters Patent No. 1,947,834, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim a Flare Signal devoid of any patentable invention in that said specification and [18] claims merely disclose a Flare Signal which anyone skilled in the art to which it pertains would be capable of

and expected to produce in the exercise of the ordinary skill of his calling;

(d) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim mere aggregations of a number of old parts or elements which, in the claimed aggregations, perform or produce no new or different functions or operations than that theretofore performed or produced by them, and hence do not amount to patentable invention;

(e) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim more than was actually invented by said Louis L. Driggs, Jr., and Henry B. Faber, if in fact and in law any invention was made by them.

IX.

For a Further, Separate and Affirmative Defense, defendant alleges that the inventors and their alleged assignee, plaintiff herein, in prosecuting the application for said patent in the United States Patent Office either voluntarily, or in response to Patent Office action, so limited the claims of said patent, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, that said plaintiff is now estopped from claiming that any of the claims of said patent have sufficient breadth to include any signal flares manufactured, used or sold by this defendant.

As and for its answer to the alleged Second Cause of Action asserted in the complaint on file

herein, defendant admits, denies and alleges as follows: [19]

X.

Defendant repeats its above-stated answers to Paragraphs IV to VII, inclusive, of the complaint and incorporates the same by reference as though specifically set forth herein.

XI.

Defendant denies the allegations of Paragraph IX of the complaint.

XII.

Defendant denies the allegations of Paragraph X of the complaint.

XIII.

Defendant denies the allegations of Paragraph XI of the complaint.

XIV.

Defendant denies the allegations of Paragraph XII of the complaint, and alleges the facts to be that the signal flares of its manufacture have approval of the United States Coast Guard and are equal in quality and workmanship to flares of like category produced by plaintiff herein.

XV.

Defendant denies the allegations of Paragraph XIII of the complaint.

XVI.

Defendant denies the allegations of Paragraph XIV of the complaint.

XVII.

For a Further, Separate and Affirmative Defense to the alleged Second Cause of Action, defendant alleges that in making the accused signal flare it has utilized conventional shapes, materials, and the natural color of such materials as is [20] necessary in the production of devices inherently suited for the purpose for which they are intended, and that it has caused all such signal flares manufactured by it to be plainly marked with its name and address and the specific approval number assigned thereto by the United States Coast Guard.

Wherefore, this defendant prays that plaintiff take nothing by its complaint herein and that said complaint be dismissed as to defendant with costs and reasonable attorneys' fees.

SIGNAL MANUFACTURING
COMPANY,

By /s/ C. A. MIKETTA,
Its Attorney.

NAYLOR & LASSAGNE,

/s/ JAS. M. NAYLOR,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 19, 1947. [21]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties to the above-entitled action, through their attorneys, that statements made during the taking of testimony of the patentee L. L. Driggs, Jr., called by plaintiff in The Kilgore Manufacturing Co., et al., vs. Triumph Explosives, Inc., et al., case, in the United States District Court of Maryland in 1940, the decision being reported at 37 F. Supp. 766, said statements and testimony appearing in the copy delivered by defendant, Signal Manufacturing Company, to plaintiff's counsel on December 3, 1948, may be referred to, used and introduced in evidence by either party, subject to objection as to relevancy, competency and materiality.

Dated this 10th day of December, 1948.

/s/ **HAROLD W. MATTINGLY,**
Attorney for Plaintiff.

/s/ **C. A. MIKETTA,**
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1948. [23]

[Title of District Court and Cause.]

ORDER ALLOWING FILING OF SECOND
AMENDED ANSWER AND COUNTER-
CLAIM

Good cause appearing and plaintiff Kilgore
Manufacturing Company not objecting,

It Is Ordered: That the Second Amended Answer
and Counterclaim of defendants Signal Manufac-
turing Company, a corporation, and Charles
Schneider, doing business as Signal Manufacturing
Company, heretofore lodged with the Clerk of this
Court, on December 9, 1949, be and is hereby filed
as of record in this cause.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Approved:

/s/ WM. EDWARD HANN,
Attorney for Plaintiff.

So Ordered: Dec. 21, 1949.

/s/ WM. C. MATHES,
Judge, U. S. District Court.

[Endorsed]: Filed Dec. 21, 1949. [24]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER AND COUNTERCLAIM

Now come the defendants, Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, and in their second amended answer to the Bill of Complaint filed herein, admit, deny and allege as follows:

I.

The defendants are without knowledge as to the allegations of Paragraph I, except as alleged therein, and therefore deny the same and leave plaintiff to strict proof thereof.

II.

The defendants admit that they are a corporation organized and existing under the laws of the State of California, and have a regular and established place of business at 4041 Whiteside [25] Street, in the City of Los Angeles, County of Los Angeles, and State of California, in the Southern District of California, Central Division, but deny that they have at that or any other place committed acts of infringement or other unlawful acts.

III.

Defendants admit that the jurisdiction of this Court as to the alleged causes of action set forth in the complaint arises under and by reason of the patent laws of the United States and the diversity

of citizenship of the parties, and admit that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

In answer to Paragraph IV, the defendants admit that a purported patent No. 1,947,834 was issued to Louis L. Driggs, Jr., and Henry B. Faber; deny that said patent covered any patentable invention in Flare Signal or otherwise; defendants are without knowledge of the remaining allegations of said Paragraph and therefore deny same.

V.

Defendants deny that they have for a long time past, or at any time, or still are infringing said Letters Patent No. 1,947,834 by manufacturing, using or selling flare signals embodying the invention patented in said Letters Patent, or will continue to do so unless enjoined by this Court.

VI.

Defendants admit they are equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and intend to continue to manufacture and sell but not use said flare signals, but deny that in so doing they are practicing a patentable invention. [26]

VII.

Defendants admit receipt of a notice in writing alleging that they have infringed said Letters Pat-

ent, but defendants are without knowledge as to the remaining allegations of said paragraph and hence deny the same.

VIII.

For a Further, Separate and Affirmative Defense, defendants allege that said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, and 15 and 16 thereof, which claims have been designated by plaintiff in a written notice dated November 18, 1947, as the claims upon which it will rely, is invalid and of no effect in law:

(a) because the alleged inventions and improvements and all material and substantial parts thereof set forth and claimed in said pretended Letters Patent No. 1,947,834 have been patented and described in the following patents and printed publications prior to the supposed invention or discovery thereof by said Louis L. Driggs, Jr., and Henry B. Faber:

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Amici	41,173	1/ 5/1864
Detewiller	79,963	7/14/1868
Powers	116,094	6/20/1871
Wood	132,227	10/15/1872
Bogardus	216,552	6/17/1879
Murphy	987,590	3/21/1911
Sweeley	1,073,940	9/23/1913
Castenholz	1,114,228	10/20/1914
Bergman	1,305,187	5/27/1919
Bergman	1,318,719	10/14/1919
Lucas	1,434,784	11/ 7/1922

North	1,481,622	1/22/1924
Wiley	1,602,601	10/12/1926
Paulus et al.....	1,641,549	9/ 6/1927
Driggs et al.....	1,712,382	5/ 7/1929
Driggs et al.....	1,712,383	5/ 7/1929
Driggs et al.....	1,754,986	4/15/1930
Driggs et al.....	1,776,755	9/23/1930
Faber et al.....	1,785,770	12/23/1930
Babbitt	1,943,292	1/16/1934
Rollet (French)	496,832	11/18/1919
Societe Aubin (French) .	502,678	5/22/1920
Brandon (British)	2,257	7/24/1869
Pain (British)	7,363	11/29/1917
Wilder (British)	128,976	7/10/1919
Wilder (British)	130,202	7/31/1919

Military Pyrotechnics, Faber, Vol 2, pages 150-156 1919;

General Rules and Regulations for Vessel Inspection, August, 1943, page II, pages G9-G11, inc.;

Army Ordnance Pamphlet No. 2031 entitled "History of Military Pyrotechnics in World War" printed in 1920, pages 8-11, 15, 16, 18, 19, 20, 21 and plates 3a, 4a and 5a;

Handbook of Ordnance Data, dated November 15, 1918, Government Printing Office, pages 287-292, inc.;

Blueprint entitled "Very Star Cartridge, Mark I, 25 m/m" dated August 6, 1918;

Blueprint entitled "Very Parachute Cartridge, Mark I, 25 m/m" dated August 6, 1918.

and by other patents and printed publications which are not at present known to these defendants but which these defendants request they be allowed to insert by amendment when ascertained; [28]

(b) because the alleged invention set forth in said Letters Patent No. 1,947,834 was not novel and patentable when alleged to have been produced by said Louis L. Driggs, Jr., and Henry B. Faber, but that said Flare Signal described and claimed in said Letters Patent, and particularly the claims thereof here relied on by plaintiff, namely, claims 1 to 11, inclusive, 15 and 16, had been known to others in this country prior to the alleged invention thereof by said Louis L. Driggs, Jr., and Henry B. Faber and particularly by the patentees and persons specified in subdivision (a) hereof;

(c) because the specification and claims of said Letters Patent No. 1,947,834, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim a Flare Signal devoid of any patentable invention in that said specification and claims merely disclose a Flare Signal which anyone skilled in the art to which it pertains would be capable of and expected to produce in the exercise of the ordinary skill of his calling;

(d) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and

claim mere aggregations of a number of old parts or elements which, in the claimed aggregations, perform or produce no new or different functions or operations than that theretofore performed or produced by them, and hence do not amount to patentable invention;

(e) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim more than was actually invented by said Louis L. Driggs, Jr., and Henry B. Faber, if in fact and in law any invention was made by them. [29]

IX.

For a Further, Separate and Affirmative Defense, defendants allege that the patent in suit and each and every claim thereof is void and invalid because, for the purpose of deceiving the public, the description and specification filed by the patentees Driggs and Faber in the Patent Office was made to contain less than the whole truth relative to their alleged invention; and that alleged invention was not shown or described or defined by the claims of the patent in suit in such full, clear, concise and exact terms as to enable those skilled in the art to practice the alleged invention or to clearly and exactly distinguish what, if anything, was actually the invention of said Driggs and Faber.

X.

Defendants further allege that the patentees of the patent in suit surreptitiously or unjustly obtained a

patent for that which was in fact invented by another or others and failed and unreasonably neglected or delayed to file a disclaimer of subject matter which was not the invention of said Driggs and Faber.

XI.

Defendants further allege that the inventors and their alleged assignee, plaintiff herein, in prosecuting the application for said patent in the United States Patent Office either voluntarily, or in response to Patent Office action, so limited the claims of said patent, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, that said plaintiff is now estopped from claiming that any of the claims of said patent have sufficient breadth to include any signal flares manufactured, used or sold by this defendant. [30]

As and for their second amended answer to the alleged Second Cause of Action asserted in the complaint on file herein, defendants admit, deny and allege as follows:

XII.

Defendants repeat their above-stated answers to Paragraphs IV to VII, inclusive, of the complaint and incorporate the same by reference as though specifically set forth herein.

XIII.

Defendants deny the allegations of Paragraph IX of the complaint.

XIV.

Defendants deny the allegations of Paragraph X of the complaint.

XV.

Defendants deny the allegations of Paragraph XI of the complaint.

XVI.

Defendants deny the allegations of Paragraph XII of the complaint, and allege the facts to be that the signal flares of their manufacture have approval of the United States Coast Guard and are equal in quality and workmanship to flares of like category produced by plaintiff herein.

XVII.

Defendants deny the allegations of Paragraph XIII of the complaint.

XVIII.

Defendants deny the allegations of Paragraph XIV of the complaint.

XIX.

For a Further, Separate and Affirmative Defense to the alleged Second Cause of Action, defendants allege that in [31] making the accused signal flare they have utilized conventional shapes, materials, and the natural color of such materials as is necessary in the production of devices inherently suited for the purpose for which they are intended, and that they have caused all such signal flares manufactured by them to be plainly marked with their

name and address and the specific approval number assigned thereto by the United States Coast Guard.

Counterclaim

For counterclaim against The Kilgore Manufacturing Company, a corporation, the defendants and counterclaimants, Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, allege as follows:

1.

The jurisdiction of this Court arises from the patent laws of the United States and by reason of the provisions of Section 2740 of the Judicial Code now 28 U. S. Code 2201 and 2202, because there is an actual controversy now existing between the parties in respect of which defendants need a declaration of and rights by this Court, which controversy arises over the question of validity and infringement of United States Letters Patent No. 1,947,834, issued February 20, 1934, the plaintiff, The Kilgore Manufacturing Company, asserting ownership in the said patent.

2.

Defendant, Signal Manufacturing Company, alleges that it is a corporation organized under the laws of the State of California and prior to November 1, 1947, had a regular and established place of business at Los Angeles, County of Los Angeles, State of California; that Charles Schneider, an individual, is an individual residing at Los Angeles.

County of Los Angeles, [32] State of California, doing business under the fictitious name and style of Signal Manufacturing Company, with a place of business at Los Angeles, California.

3.

Defendants and each of them jointly and severally allege that they have been charged with the infringement of Letters Patent No. 1,947,834 by The Kilgore Manufacturing Company; defendants and each of them allege that Letters Patent No. 1,947,834 and each and every claim thereof invalid, void and of no effect for the reasons stated in subdivisions (a), (b), (c), (d) and (e) of Section VIII of defendants' answer above set forth, and defendants adopt, repeat and reallege as Paragraph 3 of this counterclaim each and every of the allegations contained in subdivisions (a), (b), (c), (d) and (e) of Section VIII of their answer above set forth with like effect as if herein fully repeated.

4.

Defendants adopt, repeat and reallege as Paragraph 4 of this counterclaim each and every of the allegations contained in Section IX of defendants' answer above set forth with like effect as if herein fully repeated.

5.

Defendants adopt, repeat and reallege as Paragraph 5 of this counterclaim each and every of the allegations contained in Section X of defendants' answer above set forth with like effect as if herein fully repeated.

6.

Defendants adopt, repeat and reallege as Paragraph 6 of this counterclaim each and every of the allegations contained in Section XI of defendants' answer above set forth with like effect as if herein fully repeated. [33]

7.

Defendants and each of them further allege that plaintiff, The Kilgore Manufacturing Company, knowing full well that said Letters Patent No. 1,947,834 were invalid, void and of no effect, filed suit against these defendants, circularizing the trade and represented to the trade that the defendants and each of them were infringers and unfairly utilized the subject matter of said Letters Patent and harassed the trade to the damage and injury of these defendants in their business; that plaintiff, The Kilgore Manufacturing Company, has delayed proceedings conducive to crystallization of the issues, gave evasive answers to defendants' request for admissions, took depositions, both in Los Angeles and Columbus, Ohio, and subjected these defendants to unnecessary expense.

Therefore, defendants, having fully answered the complaint herein and having filed with their second amended answer the foregoing counterclaim for a declaratory judgment, pray as follows:

A. For a judgment and decree adjudging the patent in suit, No. 1,947,834, and each and every of the claims thereof to be invalid, null and void.

B. For a judgment and decree holding that the defendants, jointly and severally, have not performed any acts in infringement of Letters Patent No. 1,947,834.

C. For a judgment and decree that defendants, jointly and individually, have not been guilty of any acts of unfair competition nor have they adopted and used unfairly or unlawfully any distinctive features of plaintiff's flares. [34]

D. For a judgment and decree that the shape of the projectiles and flares manufactured and sold by plaintiff and manufactured and sold by defendants and each of them is functional and has not acquired a secondary meaning.

E. That plaintiff's complaint be dismissed as to both causes of action and that defendants have a judgment as prayed for in their counterclaim.

F. That by way of further relief the Court grant an injunction enjoining and restraining plaintiff, its agents, employees, attorneys, assigns and those acting in privity therewith from asserting, contending, claiming or representing that said Letters Patent No. 1,947,834 or any claim thereof have been infringed by defendants, either individually or jointly.

G. That costs, disbursements and attorneys' fees incurred by defendants be assessed against the plaintiff, defendants to have judgment and execution therefor.

H. For such further relief as may seem proper to the Court.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants and Counterclaimants.

[Lodged]: Dec. 9, 1949.

[Endorsed]: Filed Dec. 21, 1949. [35]

[Title of District Court and Cause.]

ANSWER TO
DEFENDANTS' COUNTERCLAIM

Now comes the Plaintiff and answering Defendants' counterclaim filed herein admits, denies and alleges as follows:

I.

Answering paragraph 1 of Defendants' counterclaim, Plaintiff admits the allegations contained therein.

II.

Answering paragraph 2 of Defendants' counterclaim, Plaintiff admits the allegation contained therein.

III.

Answering paragraph 3 of Defendants' counterclaim, Plaintiff admits that Defendants have been charged with infringement of Letters Patent No. 1,947,834 by Plaintiff but denies each and every other allegation contained in said paragraph. [37]

IV.

Answering paragraph 4 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

V.

Answering paragraph 5 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

VI.

Answering paragraph 6 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

VII.

Answering paragraph 7 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

Wherefore, Plaintiff prays for the relief herein-before prayed for in the pleadings of record in this cause.

Dated: March 22, 1950.

/s/ WM. EDWARD HANN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 22, 1950. [38]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on October 31st, November 1, 2 and 3, 1950, arguments being heard, and after due consideration, decision rendered on November 3, 1950, the Court enters the following Findings of Fact and Conclusions of Law, pursuant in Rule 52 of Federal Rules of Civil Procedure:

Findings of Fact

1. This suit involves an action by Plaintiff for infringement of claims 1 to 5, inclusive, and claims 7 to 11, inclusive, of United States Letters Patent No. 1,947,834, granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber, and an action by Plaintiff for unfair competition. This suit also involves a counter-claim alleging all the claims of the patent in suit are invalid and not infringed and alleging that Plaintiff unfairly utilized the patent in suit and harassed the trade to the damage and injury to [63] defendants.

2. The Court has jurisdiction of the subject matters and of the parties to the actions.

3. Plaintiff had and has full title to the patent in issue, had the right to bring this action for infringement of the patent and has the right to collect damages from and after a date in July, 1947, on which date Defendant, Signal Manufacturing

Company, initiated manufacture of a flare like Exhibit 2.

4. Defendant, Signal Manufacturing Company, was a California corporation and that in July, 1947, said Defendant started the manufacture and sale of the flares, like Exhibit 2, complained of by Plaintiff.

5. Defendant, Charles Schneider, is a resident of Los Angeles County, State of California, and from July, 1947, to November 1, 1947, directed and controlled the Defendant's, Signal Manufacturing Company, manufacture and sale of the flares complained of by Plaintiff.

6. From and after November 1, 1947, the said Defendant, Signal Manufacturing Company, a corporation, ceased said manufacture and sale, and Defendant, Charles Schneider, an individual, doing business under the fictitious name and style of Signal Manufacturing Company, continued and still continues the manufacture and sale of flares substantially without change from the flare Plaintiff's Exhibit 2.

7. Charles Schneider, doing business as Signal Manufacturing Company, was made a party Defendant to this cause of action and the first amended answer filed in this action on behalf of Signal Manufacturing Company, a corporation, was also the answer of Charles Schneider.

8. Defendants, Signal Manufacturing Company, and Charles Schneider, manufactured and sold

flares like Exhibit 2 since a date in July, 1947, and that Exhibit 25 is a longitudinal cross-section [64] of a flare like Exhibit 2.

9. The patent in suit relates to a signal flare which is used principally in conjunction with a pistol from which it is fired. The signal flare includes a cartridge case which fits into the barrel of a pistol. A projectile shell including a tube or side wall is formed integrally with a base. This projectile shell carries the pyrotechnic material and an expelling charge for ejecting the pyrotechnic material from the shell at the desired timed moment. A black powder propelling charge is interposed between the base of the projectile shell and the interior walls of the cartridge case, which when ignited by a firing cap in the base of the cartridge case, carries the projecting shell, to be propelled from the pistol, to a height of at least one hundred and fifty feet. A delay fuse, secured in the base of the projectile shell, is ignited by the burning propelling charge in the cartridge case, and after a predetermined time, causes ignition of the expelling charge in the projectile shell to expel the contents of the projectile shell. Preferably the delay fuse ignites the expelling charge in the projectile shell when the shell reaches substantially the zenith of its upward flight. In the embodiment of the invention under consideration in the instant cause of action, the projectile shell is utilized for expelling a flare and a parachute, the flare being attached to the parachute, which latter permits the flare to

descend slowly to earth. A thrust member in the form of a stick is interposed between the flare and parachute to insure prevention of the collapse of the folded parachute as the flare pushes the parachute out of the projectile shell when the expelling charge is ignited. Gas checks, usually employed in ammunition, are utilized. The open end of the projectile tube is closed in the usual manner for preventing the ingress of water or moisture-laden air.

10. The inventors of the patent in suit devised something new and useful. They produced a new combination of old elements [65] which together produced a better result than anything previously known to the art.

11. The subject matter of the patent in suit answered a need. It met with commercial success. Prior to the advent of the invention of the patent in suit, projectile shells were formed from two or more parts and at the joint or joints of these multiple parts, the material of the parts had to be of sufficient thickness for welding or otherwise securing the parts to one another. Those structures thus necessitated employing heavier materials than the integral tube and base structure of the projectile shell of the patent in suit. Because of the weight of the heavy multiple projectile shell, the shell had to be made small in caliber to lift the same to the desired elevation when using a hand fired pistol. Consequently, the smaller caliber shell could not carry a flare that provided sufficient burning time and sufficient candlepower.

12. Prior to the advent of the invention in suit, no one had devised a light weight metallic projectile shell which would meet the desires of lift to the desired elevation, contain a flare of sufficient candle power, burn for a sufficient desired time, and which projectile shell insured against premature ignition of the expelling charge therein.

13. The signal parachute flare, embodying multiple part projectile shells, designed to be shot from Very and Webley-Scott pistols and valued at a million dollars were dumped into the Atlantic Ocean, after World War I, because of the failure of that type of flare to function properly.

14. By forming the projectile shell with an integral base and side walls, premature ignition of the expelling charge in the projectile shell, by the propelling charge in the cartridge case, was entirely eliminated, making possible for the first time the use of relatively thinner side walls of the projectile shell, yet assuring prevention of premature ignition of the expelling charge in the [66] projectile shell. The base of the projectile shell being integral with the side wall of the shell prevents mutilation of the side wall by the explosions of the propelling charge in the cartridge case and the expelling charge in the shell itself. This sturdy, yet light weight, projectile shell resulted in reducing the quantity of propelling charge in the cartridge case to lift the projectile shell to the desired elevation, or, stated in another way, by providing a light weight projectile shell, which insured against premature igni-

tion of the expelling charge therein, the projectile shell and contents, which would burn for thirty seconds, could be elevated to the desired height of one hundred and fifty feet or more when fired by a pistol that could be held in the hand, without serious recoil. Moreover, by this construction, the weight of the projectile shell was reduced to such that no serious injurious result would follow should the falling empty shell strike, for example, an occupant of a lifeboat.

15. Signal parachute flares made in accordance with the teachings of the patent in suit were the first successful distress signals that could be fired from a hand-held pistol and could be seen from a distance of twenty-five or thirty miles when shot by an occupant in a lifeboat.

16. Signal parachute flares made in accordance with the teachings of the patent in suit are the type approved by the United States Coast Guard, used extensively on vessels, required on certain size vessels and used extensively by the United States Army, Navy and Air Corps.

17. Powers' patent No. 116,094 granted in 1871, Exhibit F-3, and the British Patent No. 2,257 of 1870, Exhibit F-21, the latter being cited by the United States Patent Office during the prosecution of the application of the patent in suit, each show a cartridge case formed with a tubular side wall and an integral base. There is no suggestion in either of these patents of the use of a cartridge case in combination with a projectile shell having integral

side wall and base as defined in claims 10 and 11 of the patent in suit. [67]

18. None of the other prior art patents or literature, relied on by the Defendants at the trial of the case, discloses a projectile shell of integral side wall and base construction as defined in claims 10 and 11 of the patent in suit. The Driggs, et al., Patents Nos. 1,712,383, Exhibit F-16; 1,754,986, Exhibit F-17; 1,776,755, Exhibit F-18; 1,785,770, Exhibit F-19; the publication, History of Military Pyrotechnics in World War, Exhibit F-27; Very Parachute Cartridge, Exhibit F-32; Very Star Cartridge, Exhibit F-31; each show projectile shells in which the base and side walls are not formed integrally. The projectile shell made by Plaintiff in accordance with the disclosure in Driggs, et al., No. 1,776,755, Exhibit F-18, was formed of a plurality of pieces and is so described in said patent, see page 1, starting with line 62; said shell was subject to leakage.

19. None of the patents relied upon by Defendants anticipate or specifically restrict claims 10 and 11 of the patent in suit, nor do any of the other patents pleaded as anticipation in their answer.

20. The patentees were the original and first inventors of the invention of the patent in suit, as defined by claims 10 and 11 here in issue. The invention defined by claims 10 and 11 are directed to a combination that is not only new and useful, but embodies invention and constitutes patentable subject matter.

21. Defendants' flare, as exemplified by Exhibits 2 and 25 perform the same work in the same way by substantially the same structure defined by claims 10 and 11 of the patent in suit.

22. Defendants manufacture and sell flares in violation of claims 10 and 11 of the patent in suit and thereby infringe said patent. The infringement by Defendants was conscious, deliberate and wilful.

23. Claims 1 to 5, inclusive, are not limited to a projectile shell in combination with a cartridge case. Claim 9 is not [68] limited to a projectile shell having integral side wall and base. Claims 7 and 8 do not recite a thrust member.

24. Defendants have copied Plaintiff's device, not only internally but externally, with a few minor exceptions, both functional and non-functional.

25. The similarity of external appearance of the Defendants' product is not likely to confuse the public interested in this field or the public active in this field as to the origin of Defendants' product.

26. There is no evidence or testimony submitted showing that Plaintiff unfairly utilized the patent in suit or harassed the trade to the damage and injury to Defendants.

Conclusions of Law

1. Claims 10 and 11 of the United States Letters Patent No. 1,947,834 describe the combination and all essential elements of it with sufficient specificity and are valid and infringed.

2. Claims 1 to 9, inclusive, and 12 to 23, inclusive, of said Patent No. 1,947,834 are invalid.
3. Defendants' product, exemplified by Exhibits 2 and 25, incorporate the invention defined by claims 10 and 11 of the patent in suit and constitute an infringement of said claims.
4. Plaintiff is entitled to an injunction against further infringement by Defendants and those controlled by Defendants.
5. Plaintiff is entitled to a judgment against Defendants for general damages which Plaintiff may have sustained as a proximate result of infringement of claims 10 and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.
6. Plaintiff is entitled to an accounting from Defendant, [69] Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid the determination of issue of Plaintiff's damages resulting from infringement by Defendants of claims 10 and 11 of the patent in suit.
7. Plaintiff will recover costs of the Defendants, to be taxed by the Clerk.
8. Plaintiff's second cause of action, asserted in the bill of complaint, and Defendants' counterclaim,

asserted in the second amended answer and counter-claim, are hereby dismissed.

Dated: November 9, 1950.

/s/ WARREN H. F. SCHMIEDING,
Attorney for Plaintiff.

Approved as to form:

C. A. MIKETTA,

W. W. GLENNY,

By
Attorneys for Defendants.

File not signed, Jan. 31, 1951.

/s/ MATHES,
Judge.

[Lodged]: Nov. 9, 1950.

[Endorsed]: Filed Jan. 31, 1951. [70]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO AND REVISIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AS PROPOSED BY PLAINTIFF

Defendants object to the findings of fact and conclusions of law filed by plaintiff November 9, 1950, because:

- (1) They do not give the Appellate Court a

clear understanding of the basis of the decision.

(2) Certain findings are contrary to the evidence.

(3) Certain findings are unsupported by the evidence.

The Supreme Court in *Schneidermann v. United States*, 320 U. S. 118, at 129, has ruled that findings of ultimate facts are no longer sufficient. It appears desirable to state the basis of the decision in considerable detail (see *U. S. v. Bergmann*, 47 Fed. Supp. 765; sent back by CCA 9 for more detailed findings). There are no findings of fact to support conclusion of law No. 2. [40] In order to provide basis for conclusion No. 2, the following findings of fact should be added:

A-1. The combination described in claims 1-9 and 12 is not a combination which would produce a new and improved result. Claims 1-9 and 12 are too broad and do not constitute a complete combination. Claims 1-6, 15, 16, 18, 19 and 20 do not include a cartridge. Claims 6, 9, 15, 16, 17 and 20 do not require that the projectile shell be made of one piece of metal with integral walls and a bottom. None of the claims specify the necessary taper to the end of the fuse. Claims 1-3 and 5-23 do not include the wooden annulus surrounding the expelling charge and acting as a cushion. Claims 1-3, 6-9, 12 and 17-23 do not include the necessary thrust stick or means to prevent collapse of the parachute. The evidence establishes and the

Court finds that there is no new or patentable result attained by the combinations recited in claims 1-9 and 12-23 and that the combinations of said claims are not new.

A-2. During prosecution of the patent in suit Driggs and Faber solicited claims directed to a flare shell comprising an apertured base with a smooth exterior without shoulders and an integral drawn wall of thinner section than the base, said shell being formed of one piece drawn aluminum body, but such claim was rejected by the United States Patent Office and withdrawn by Driggs and Faber. In lieu of such withdrawn claim, Driggs and Faber obtained claims (such as claim 1) in which specific reference was made to a tubular eyelet having a shoulder inserted in the aperture, the shoulder resting on the outside of the base of the shell. During the prosecution of [41] the patent in suit, the Examiner and Board of Appeals of the United States Patent Office rejected claims such as 35, 36 and 38 directed to a combination of a one-piece drawn shell, a delay fuse and a cartridge case on the ground of lack of invention, and applicants assented to such rejection and withdrew such claims (Admission A-20, Exhibit G, pages 17-18; defendants' Exhibit A, page 68). A one-piece projectile shell and a short cartridge for use as a signal device, the shell contained a pyrotechnic, is shown in patent No. 1,641,549, defendants' Exhibit F-14.

A-3. The evidence establishes and plaintiff admits that more than two years prior to the filing date of the patent in suit there was publicly used and sold in the United States a tubular projectile having a transversely extending bottom, an aperture in such bottom and a tubular eyelet inserted into such aperture, the eyelet having a flange resting on the outside of the base or bottom, the eyelet having a reduced inner end and a fuse powder in the eyelet (Defendants' Exhibit G, page 8, Admission A-6); that the manufacture of a case or shell by drawing metal to produce a shell having side walls and a base integral therewith was known to others prior to the earliest date of invention by Driggs and Faber.

A-4. The evidence establishes that prior to the earliest date of invention by Driggs and Faber of the subject matter of the patent in suit, there was described in printed publications and known to others parachute flares arranged to shoot a flare into the air, ignite such flare and permit the flare to descend while attached to a parachute (exemplified by defendants' [42] Exhibits F-1, F-16, F-18, F-27). The evidence establishes that the prior art showed and described flare signals arranged to be shot from a hand gun, such signals including a cartridge case or base cap provided with a percussion cap and propelling charge, in combination with a projectile shell carried by the cartridge, the base of the shell carrying a suitable delay fuse,

an expelling charge within the shell and an arrangement of gas checks or washers, flare candle, parachute, lines connecting the parachute to the flare candle, an end closure for the shell and means for preventing the parachute from being crushed or wadded during ejection from the shell. The evidence establishes that the cartridges of the prior art used in combination with such projectile shells and contents were provided with side walls and an integral base of metal and that the base of the cartridge was flanged or grooved to fit either breech or muzzle loading guns. That the shape of the cartridges was compatible with and fitted the shape and bore of the chambers of the guns.

Finding of fact No. 2 proposed by plaintiff is objected to. This is not a finding of fact but a conclusion of law and should be placed among the conclusions.

Finding of fact No. 3 proposed by plaintiff is ambiguously worded and should be rephrased in accordance with items 6 and 7 of the pretrial stipulation (Exhibit 21) filed January 14, 1949. [43]

Finding of Fact No. 9 proposed by plaintiff is objected to on the ground that it does not correctly state what is in the patent in suit and is unsupported by the disclosures of the patent in suit. The phrase "to a height of at least 150 feet" (appearing on page 3, lines 12 and 13) has no foundation in fact and the patent makes no reference to any stated height. This phrase should be stricken. The word "delay" (appearing in line 13 on page 3)

does not appear in the patent in suit and should be stricken. The phrase "at the desired timed moment," appearing in line 8, page 3, should be stricken, since this mode of operation does not appear in the patent in suit. The phrase "after a predetermined time," appearing in line 15, on page 3, should be stricken, because the patent in suit does not so state. The sentence in lines 17-19 reading, "Preferably the delay fuse ignites the expelling charge in the projectile shell when the shell reaches substantially the zenith of its upward flight," should be stricken, since this mode of operation is not stated in the patent in suit.

It is apparent that plaintiff is attempting to have the Court make findings on inference and not on facts, a patent is a legal document and cannot be construed or modified by parol testimony; it must be judged by what it shows on its face. Since a patent is a contract it must be construed most strongly against the party using it. Proposed finding 9 is objected to because it attempts to read into the patent things which it does not state.

Proposed finding 9 is incomplete since it fails to include the annular wooden ring 7 around the expelling charge 6. Clauser testified that this wooden ring was necessary and plaintiff's counsel has represented that it is an element constituting the purported novel combination (R. 230, lines 8-17). Novelty was also claimed in the taper of the fuse (R. 229). Proposed finding 9 does not include these necessary elements and is, therefore, inaccurate, incomplete and misleading. It is requested that [44]

the following finding be substituted in lieu of finding 9 as proposed by plaintiff:

B-1. The flare signal construction described in the patent in suit includes a cylindrical shell or case, referred to as a projectile shell, fitted into the open end of a base cap or cartridge. The cartridge contains a propelling charge and a primer or firing cap. The projectile shell is preferably made of one piece of metal, such as aluminum, with a relatively heavy base and thin side walls and carries a fuse in the base or bottom, an expelling charge surrounded by a wooden annulus, a flare candle, a parachute connected to the flare candle by suitable wire and cord, an end closure, gas checks or felt washers between the candle and parachute and beneath the candle, and a stick or thrust member between the end closure and flare candle. Defendants' flares are exemplified by Exhibits 2 and 25. Plaintiff's flares are exemplified by Exhibits 7 and 28. Both plaintiff's and defendants' flares use a felt washer between the shoulder of the fuse and the bottom of the projectile case, such washer not being shown in the patent in suit.

Finding No. 10 proposed by plaintiff is objected to as a statement of conclusion and not a statement of facts of value to an Appellate Court in appraising the basis upon which the conclusions of law rest. It does not state wherein the combination was new (plaintiff's counsel states that the combination is

old except for the one-piece shell; R. 327 and 328). It does not identify the alleged new result. The record belies the finding of a "better result." [45]

"The Court: As a matter of fact, it is claimed where the prior art knew better flares of the same combination for these purposes, isn't it?

"Mr. Schmieding: That is true." (R. 341, lines 9-12.)

It is submitted, therefore, that proposed finding 10 is unsupported by the evidence and in lieu thereof defendants submit that the following finding be made:

C-1. The evidence establishes that there is no novelty in, and plaintiff does not claim that there is novelty in, the arrangement and combination of a projectile containing a parachute candle or flare, protecting washers or gas checks, expelling charge and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap (defendants' Exhibit G, page 3, Admission D-6 (d)). The evidence shows that the patentee Driggs, now deceased, had testified that there was nothing new in the combination of a cartridge case with a projectile containing the contents nor in the arrangement of contents of the projectile.

C-2. The evidence establishes that prior to the earliest date of invention by Driggs and Faber of that which is described and claimed

in the patent in suit there was known to others in the United States signal flare ammunition including a cartridge case and a projectile, the cartridge being short and the projectile being relatively long; and that there was described in prior publications and known to others a parachute-type flare including a projectile shell, an annular wooden disc partially surrounding the expulsion charge near one end of the shell, a flare, a parachute, a wire or string connecting the [46] parachute to the flare and a washer or gas check between the parachute and the flare (exemplified by Exhibit 16).

C-3. The evidence establishes and the Court finds that there is no patentably new relationship or cooperation between the various elements of the signal flare described and claimed in the patent in suit; that the propelling charge of the cartridge propels the projectile case or shell by the same mode of operation as that used in devices of prior expired patents; that the ejecting charge carried in the projectile shell expels the contents of such projectile shell by the same mode of operation as that occurring in devices of prior patents. Plaintiff's expert and director of research admitted that the action of the eyelet or delay fuse was not influenced by the presence or absence of walls on the projectile shell (R. 246-247) and that whether the projectile shell was made of one or two pieces would not affect the burning characteristics of the flare candle composition (R. 225, lines 19-23; R. 223, lines 9-18).

Finding 11, as proposed by plaintiff, is objected to on the ground that it is contrary to the evidence. There is no evidence as to the existence of a "need"; there is no evidence as to commercial success. The matter in lines 4-8 on page 4 of plaintiff's proposed findings is in direct opposition to the record in this case (see defendant's Exhibit 14 and pages 68-69 of defendants' Exhibit A). The matter in lines 8-15 cannot be supported by the evidence in this case, particularly in view of the teachings of the prior art which use "light metal" such as aluminum [47] in manufacturing projectile shells.

It is submitted that finding 11 should be stricken as not supported by the evidence.

Defendants object to finding 12 as proposed by plaintiff on the ground that it is contrary to the evidence, which clearly shows that the prior art had taught the use of light metal such as aluminum for use in projectile shells. Statements as to "sufficient candle power," and "desired time" have no bearing here, since they do not affect the question of invention. The Court is not adjudicating Coast Guard specifications which require certain performance characteristics, but instead, is only concerned with the structural means described in the patent.

It is submitted that finding 12 should be stricken as unsupported by the evidence.

Finding 13, as proposed by plaintiff, is contrary to Exhibit F-27 and contrary to Clauser's testimony (R. 216-217). Coast Guard specifications require replacement of all flares, including those made by plaintiff and defendants, three years from their date

of manufacture. Findings of fact should not be burdened with erroneous statements nor with statements having no pertinency to the issues of validity and infringement. Finding 13 should be stricken as being contrary to the evidence and irrelevant.

Finding 14 proposed by the plaintiff is objected to on the following grounds: The statement appearing in lines 27-32 on page 4 is not true. Premature ignition of the expelling charge is prevented by the taper on the end of the fuse (Clauser, R. 187, lines 15-18). This taper is very important (R. 187, line 6); the device is dangerous without it (R. 188, lines 11-22). [48]

Moreover, the statement appearing in lines 1-4 on page 5 is not true. Clauser had testified that the wooden annulus acted as a cushion and prevented disruption of the thin walls of the projectile case (R. 184-185).

Finding 14 is therefore erroneous, incomplete, and contrary to the evidence. It is submitted that this finding should be stricken and the following substituted in its place:

D-1. By making the projectile shell out of light metal, such as aluminum, a lightweight projectile shell was obtained. By making side walls and bottom of the shell from one piece of aluminum, joints were eliminated.

Finding 15, as proposed by plaintiff, is objected to on the ground that it is not supported by the evidence. There is no evidence to support the statement that plaintiff's flares were "the first successful

distress signals." A signal is only "successful" when it is seen under the proper conditions.

We suggest that finding 15 be revised to read:

E-1. The higher a parachute-type flare is shot and liberated, the greater the distance it can be seen. The height to which the projectile is shot depends upon the kind and quantity of propellant used in the cartridge. The Coast Guard specifications require that the parachute be ejected at a height of not less than 150 feet.

Finding 16 proposed by plaintiff is objected to as misleading and inaccurate. The Coast Guard does not require the use of a one-piece shell, a wooden annulus, a tapered delay fuse or a thrust stick. It is submitted that finding 16 should be stricken and revised to read as follows: [49]

F-1. Signal parachute flares as manufactured by plaintiff and defendants and exemplified by Exhibits 2 and 25 (defendants' flares) and Exhibits 7 and 28 (exemplary of plaintiff's flares), are used by the United States Army, Navy, Air Corps and on vessels, and are subject to approval by the United States Coast Guard.

Proposed finding 17 is objected to as misleading and contrary to the evidence. The last sentence of this finding, appearing in lines 30-33 on page 5, should be rewritten to read:

These patents do not disclose the use of a cartridge case in combination with a projectile shell having integral side wall and base as de-

fined in claims 10 and 11 of the patent in suit, but such combination is shown in patent No. 1,641,549 (Exhibit F-14) and in patent No. 1,776,755 (Exhibit F-18).

Finding 18 as proposed by plaintiff. The first sentence of this finding is contrary to the evidence and should be stricken, because defendants' Exhibit F-14, patent No. 1,641,549, shows a projectile shell with an integral bottom and plaintiff has admitted that such projectile shells were old (Admission B-5(d), page 11, defendants' Exhibit G).

The last sentence of this finding (lines 10-14) should be stricken as contrary to the evidence. Exhibit F-18 speaks for itself. Even if the makers did not follow the showings of the patent, that does not affect or change the documentary showing.

Proposed findings 19 and 20 submitted by plaintiff are objected to as statements of conclusions and not findings of fact; it is suggested that these findings be stricken and the [50] following be substituted in their stead:

G-1. That no single prior art patent specifically shows each and every element of the purported combinations as stated in claims 10 and 11.

Finding 21, as proposed by plaintiff, is contrary to the evidence. It has been pointed out that claims 10 and 11 do not call for the "very, very important" tapered end on the fuse; they do not call for the annular wooden ring which Clauser stated was essential and which plaintiff's counsel stated was an

element of novelty in combination with the walls of the shell; the claims do not include necessary gas checks; they do not define a tight fit between the fuse and the bottom of the shell; they do not state that the parachute must be connected to the flare candle. Defendants employ a separate gas check or washer between the delay fuse and bottom of the projectile shell to prevent cracking of the delay fuse composition and such mode of operation and means are not shown in the patent in suit.

In view of these differences, proposed finding 21 is contrary to the evidence, incorrect, and should be stricken.

Finding 22, as proposed by plaintiff, is objected to. Infringement is a conclusion of law. Furthermore, there is no evidence to justify the conclusion that defendants' acts were conscious, deliberate and wilful. Admittedly defendants engaged in the manufacture of signal flares, but their acts should not be condemned; they had the same right to enter into this business as any other member of the public.

It is requested that proposed finding 22 be stricken and the following substituted in its [51] stead:

H-1. Defendants manufacture and sell signal flares as exemplified by Exhibits 2 and 25 and such flares conform to the requirements expressed in the United States Coast Guard specifications. Defendants' flares use a one-piece projectile shell taught in patent No. 1,641,549 (Exhibit F-14), a wooden annulus, as taught in patent No. 1,712,383 (Exhibit F-16),

and arrange the contents of the projectile shell in the manner of the contents of patent No. 1,776,755 (Exhibit F-18). In addition, defendants use a delay fuse without a taper and use a gas check or washer between the delay fuse and bottom of the projectile shell.

Proposed finding 23 is incomplete and does not follow your Honor's ruling. It is submitted that in lieu of finding 23, as proposed by plaintiff, defendants' proposed finding A-1 (proposed on page 2 of these objections) should be substituted.

Proposed finding 24 is objected to on the ground that it does not conform to the evidence and is actually unsupported by the evidence. No non-functional, unique element has been disclosed or described by the testimony. There are no unique, non-functional, decorative features in plaintiff's flare and therefore it cannot be stated that defendants have copied non-functional features. Furthermore, there is no evidence of actual copying and therefore the entire proposed finding 24 should be stricken as contrary to the evidence and incapable of being supported by the evidence.

It is believed that the Court should make the following finding in order to prevent any subsequent assertion on the part of the plaintiff as to functional features: [52]

1-1. The evidence establishes that the taper of the side walls of the cartridge case is produced during attachment of the projectile shell to the cartridge in order to obtain a necessary tight fit and is also influenced by the taper of

the chamber of the approved gun. The evidence establishes that it is customary in the pyrotechnic art to indicate the color of the signal flare by an application of color to the end portion of the device. The Court finds that the general appearance of the signal flare is functional.

Finding 25, as proposed by plaintiff, is objected to on the ground that it is incomplete and does not furnish sufficient basis for the holding of no unfair competition. It is believed that this finding should be stricken and the following findings substituted in its stead:

J-1. The evidence further establishes that both plaintiff and defendants mark their respective parachute flares with their respective company names, both on the projectile case and on the cartridge in accordance with requirements established by the United States Coast Guard. The evidence shows that defendants clearly and legibly mark all cartons containing their flares with the name "Signal Manufacturing Company" and similarly mark larger cartons containing larger quantities of flares.

J-2. Plaintiff has not proven and established that defendants have sold and palmed off upon the purchasing public the signal flare made by defendants as and for plaintiff's signal flare. There is no evidence that defendants have misrepresented their products as those of [53] plaintiff.

J-3. The evidence does not establish that ship chandlers and other purchasers recognize plaintiff's signal flares as plaintiff's products by reason of the appearance of plaintiff's products. There is no evidence that the form of plaintiff's signal flares is associated in the minds of the prospective purchasers with plaintiff as the source. No evidence was adduced to show that any purchaser was deceived by defendants.

Finding 26, as proposed by plaintiff, is objected to on the ground that it is not a correct statement and does not properly express the facts. Plaintiff's actions during trial, in attempting to mislead the Court into the belief that defendants were selling to the trade signal flares that did not pass specifications and inspection by the Coast Guard (R. 146, lines 15-20), are ample proof that the same tactics were used by plaintiff in misrepresentations to the trade.

Finding 26 should be revised to read as follows:

K-1. It has not been satisfactorily proven that plaintiff unfairly utilized the patent in suit and harassed the trade to the damage and injury of the defendants in their business, as alleged in the counterclaim.

In addition to the findings proposed by plaintiff, it is submitted that one additional finding should be made. Your Honor has probably noted that in some decisions the Courts have deemed it desirable to make a finding in support of the award of attor-

ney's fees. It is submitted, therefore, that in the instant case the following finding should be made by the Court: [54]

L-1. That plaintiff has delayed proceedings conducive to crystallization of the issues, took depositions in Los Angeles, California; Columbus, Ohio, and Westerville, Ohio, and did not introduce details of tests conducted during said depositions. That during trial plaintiff made misleading representations and urged novelty in elements and combinations disclaimed by the patentees of the patent in suit; that plaintiff admitted that there was no novelty in the contents of the projectile and later contended that the entire mechanism was in issue (R. 231); that plaintiff first alleged that all elements were old and later represented that there was novelty in the tapered fuse (R. 229), and in a combination with the wooden annulus (R. 230); that although the patentees had disclaimed the combination of a one-piece shell with a cartridge, plaintiff contended during trial that such combination was novel; thereby unnecessarily prolonging the trial and proceedings in this case and imposing a greater burden upon the defendants.

For the reasons above stated, it is respectfully requested that the findings of fact proposed by plaintiff be revised in accordance with the suggestions expressed hereinabove, even though your Honor does not modify his decision, as stated in

the record. However, it is hoped that, upon review of the facts, including defendants' memorandum on invalidity of claims 10 and 11, and upon hearing thereon upon a day to be set by the Court, your [55] Honor's decision will be modified to a holding of invalidity as to all of the claims.

Dated this 14th day of November, 1950.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Service and receipt of copy acknowledged.

[Endorsed]: Filed Nov. 14, 1950. [56]

[Title of District Court and Cause.]

PETITION FOR REHEARING

Pursuant to your Honor's suggestion and in lieu of a motion for new trial, defendants request a hearing to review this case upon objections to findings as submitted by plaintiff, upon a day to be set by your Honor.

The Court has held claims 10 and 11 valid, but counsel is convinced that the patent in suit and each claim thereof is invalid. Counsel has a duty to the Court as well as to the client and does not want your Honor to render a judgment which is in error.

Defendants have relied upon admissions by plaintiff (defendants' Exhibit G), but during trial

plaintiff has repudiated such admissions and has advanced contentions which are contrary to plaintiff's former representations. One of these false [57] contentions, namely that there is novelty in a combination involving a one-piece projectile shell and a cartridge, has influenced your Honor into a holding that claims 10 and 11 are valid. Plaintiff's contention is contrary to the evidence.

For example, claim 35 was solicited by Driggs and Faber but was rejected by the United States Patent Office and the Patent Office Board of Appeals. This claim appears at the bottom of page 17 of defendants' Exhibit G and reads as follows:

“In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein and a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the cartridge case.”

This claim is therefore fundamentally the combination of a one-piece shell with a cartridge. This claim was cancelled, withdrawn and disclaimed because it does not define a new combination nor does it include any new element. The Patent Office Board of Appeals in rejecting this claim stated:

“In the rejection of claims 35 and 36, the Examiner relies on the patent to Paulus, et al. As pointed out in his statement, this patent discloses everything set forth in these claims with the exception that it does not disclose the one-piece shell case 2 to have been formed by a

drawing operation. It is common, however, to so form one-piece shell cases as disclosed in the patent to Brandon. Furthermore, the shell case 1 in Paulus, et al., is deemed the full patentable equivalent of the drawn shell case recited in these claims.”

(See page 68 of file history, defendants’ Exhibit A.) [58]

The Paulus patent is No. 1,461,549, defendants’ Exhibit F-14. The Brandon patent is defendants’ Exhibit F-21. Upon glancing at the Paulus patent, your Honor will note that this shows a projectile case 1 which is made of one single piece of metal, the bottom being heavier than the side walls. The bottom portion of the projectile shell is held by the cartridge 12. The Brandon patent, F-21, in Fig. 4, shows a one-piece shell with a heavier bottom and thinner walls. The Powers patent, F-3, also shows a one-piece shell with an aperture in the bottom and an eyelet in such aperture.

The Board of Appeals held, as experts in patent law, that there was no invention involved in the combination as stated in claims 35, 36 and 38. It is to be remembered that the Patent Office did not have before it Exhibits F-3, F-16, F-17 and F-18, which make defendants’ contention of invalidity even stronger.

Since the patentees disclaimed the combination of a one-piece shell and a cartridge, and one-piece projectile shells are admittedly not new (admission B-5 (d), page 11, defendants’ Exhibit G), it was

error on the part of plaintiff to now urge patentable invention in such combination. It would be error for this Court to hold that such combination is patentable.

“It should be noted in this case that the File Wrapper and Contents indisputably shows that the patent office rejected any broad claims of discovery or invention as residing in the Williams construction * * *” (Judge Paul McCormick in *Patterson v. Roto-Hangar Co.* (Aug. 3, 1949), 83 P.Q. 333.)

There can be no invention in patent law in substituting an old one-piece shell for the shells shown in prior expired patents, such as F-17 and F-18. [59]

No new result is obtained since every old element acts in exactly the same way. It is certainly discretionary with the manufacturer of a flare shell (and not inventive) to put more or less propellant in the cartridge in order to get more or less height; it is simply a question of selection and not invention to put red, white or blue flares in his shell; it is not invention to so compound the flare candle that it burns for 20 seconds, 30 seconds or a minute.

The arrangement of flare, gas checks, parachute, thrust stick, etc., is clearly shown in the prior expired patents, such as F-17 and F-18, and, therefore, plaintiff cannot base invention on such arrangement.

It is believed that your Honor has been misled by plaintiff's confused, indefinite and shifty tactics. Your Honor may have been misled by the garrulous, biased and argumentative testimony of Clouser. De-

fendant relies upon your Honor's assurance that competent evidence only will be considered. The irrefutable evidence of prior patents and admissions should control. Validity cannot be supported by inferences from opinion testimony which was not amplified or supported by documentary proof.

It is therefore requested that the Court set a day convenient to your Honor for a review of this case in the light of the Memorandum on Invalidity of claims 10 and 11, the objections to findings as proposed by the plaintiff and the factual record in this case. In order to facilitate proceedings and terminate this case, defendants also submit findings of fact, conclusions of law and judgment in a form based upon invalidity of the entire patent in suit. The findings proposed by defendants include numerous references to the record and, although such references may be stricken in the final form of the findings, they may be of assistance to [60] your Honor in reviewing the entire case and the facts upon which validity of the entire patent should be found.

Dated this 14th day of November, 1950.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

[Endorsed]: Filed Nov. 14, 1950. [61]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 29th day of December, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

MINUTE ORDER

Good cause appearing therefor, it is ordered that the order of Nov. 3, 1950, for findings and judgment and reference is vacated as to all its provisions and the cause is ordered placed on the calendar of Jan. 5, 1951, 2 p.m., for further oral argument. [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on October 31st, November 1, 2 and 3, 1950, arguments being heard, and after due consideration, decision rendered on November 3, 1950, the Court enters the following Findings of Fact and Conclusions of Law, pursuant in Rule 52 of Federal Rules of Civil Procedure:

Findings of Fact

1. This suit involves an action by plaintiff for infringement of United States Letters Patent No. 1,947,834, granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber, and an action by plaintiff for unfair competition. This suit also involves the issues raised by defendants' second amended answer and counterclaim alleging all [71] the claims of the patent in suit to be invalid and not infringed, and praying a declaratory judgment accordingly.
2. Plaintiff had and has full title to the patent in issue, had the right to bring this action for infringement of the patent, and has the right to collect damages during and after the month of July, 1947, on which date defendant Signal Manufacturing Company initiated manufacture of a flare like Exhibit 2.
3. Defendant Signal Manufacturing Company was a California corporation, and in July, 1947, said defendant started the manufacture and sale of the flares, like Exhibit 2, complained of by plaintiff.
4. Defendant Charles Schneider is a resident of Los Angeles County, State of California, and from July, 1947, to November 1, 1947, directed and controlled defendant Signal Manufacturing Company's manufacture and sale of the flares complained of by plaintiff.
5. From and after November 1, 1947, defendant

Signal Manufacturing Company, a corporation, ceased said manufacture and sale, and defendant Charles Schneider, an individual doing business under the fictitious name and style of Signal Manufacturing Company, continued and still continues the manufacture and sale of flares substantially without change from the flare, Exhibit 2.

6. Charles Schneider, doing business as Signal Manufacturing Company, was made a party defendant to this action and the first amended answer filed in this action on behalf of Signal Manufacturing Company, a corporation, was and, is also the answer of Charles Schneider.

7. Defendants Signal Manufacturing Company and Charles Schneider manufactured and sold flares like Exhibit 2 since a date in July, 1947, and Exhibit 25 is a longitudinal [72] cross-section of a flare like Exhibit 2.

8. Defendants' flares are exemplified by Exhibits 2 and 25. Plaintiff's flares are exemplified by Exhibits 7 and 28.

9. The inventors of patent No. 1,947,834 in suit devised something new and useful. They produced a new combination of old elements which together produced a better result than anything previously known to the art.

10. The subject matter of the patent in suit is in a crowded field. It answered a long-existing need which had not been answered by the prior art, and met with commercial success.

11. Prior to the advent of the invention in suit, no one had devised a metallic projectile shell which would meet the need of lift to an effective elevation, carrying a flare of high candle power which would burn for a relatively long period of time, and be reasonably certain to function at the approximate zenith of its upward flight without premature ignition of the expelling charge therein.

12. Signal parachute flares made in accordance with the teachings of the patent in suit were the first successful distress signals that could be fired from a hand-held pistol and could be seen from a distance of twenty-five to thirty miles when shot by an occupant of a lifeboat.

13. The patentees were the original and first inventors of the invention of the patent in suit, as defined by claims 10 and 11 here in issue. The invention defined by claims 10 and 11 is directed to a combination that is not only new and useful, but embodies invention and constitutes patentable subject matter.

14. Defendants' flare, as exemplified by Exhibits 2 and 25 perform the same work in the same way by substantially [73] the same structure defined by claims 10 and 11 of the patent in suit.

15. Defendants manufacture and sell flares in violation of claims 10 and 11 of the patent in suit and thereby infringe said patent. The infringement by defendants has been and is conscious, deliberate and wilful.

16. Claims 1-9 and 12 are too broad and do not specify a complete combination. Claims 1-6, 15, 16, 18, 19 and 20 do not include a cartridge. Claims 6, 9, 15, 16, 17 and 20 do not specify a projectile shell of one piece of metal with integral walls and a bottom. Claims 1-3, 6-9, 12 and 17-23 do not include the necessary thrust stick or means to prevent collapse of the parachute. Claims 1-9 and 12-23 are invalid for the reasons stated.

17. Defendants have copied plaintiff's device, not only internally but externally, with a few minor exceptions, both functional and non-functional.

18. The similarity of external appearance of the defendants' product is not likely to confuse the public interested in this field as to the origin of defendants' product. The evidence discloses that plaintiff and defendants mark their respective parachute flares with their respective company names, both on the projectile case and on the cartridge in accordance with the requirements established by the United States Coast Guard. The evidence further shows that defendants clearly and legibly mark all cartons containing their flares with the name "Signal Manufacturing Company" and similarly mark larger cartons containing larger quantities of flares.

19. The evidence does not establish that defendants have sold or palmed off upon the purchasing public the signal flare made by defendants as and for plaintiff's signal flare; or that defendants have misrepresented their products as those [74] of

plaintiff; or that ship chandlers or other purchasers recognize plaintiff's signal flares as plaintiff's products solely by reason of the appearance of plaintiff's products; or that the form of plaintiff's signal flares is associated in the minds of the prospective purchasers with plaintiff as the source; or that any purchaser has been deceived by the similarity in appearance between defendants' flares and those of plaintiff.

20. The evidence does not establish that plaintiff unfairly utilized the patent in suit or harassed the trade to the damage or injury of defendants in their business, as alleged in the counterclaim.

Conclusions of Law

1. This court has jurisdiction of the parties and the subject matter.

2. Claims 10 and 11 of United States Letters Patent in suit No. 1,947,834 describe the combination and all essential elements of it with sufficient specificity and are valid and infringed.

3. Claims 1 to 9, inclusive, and 12 to 23, inclusive, of said Patent No. 1,947,834 are invalid for the reasons *inter alia* set forth in paragraph 16 of the findings of fact.

4. Defendants' product, exemplified by Exhibits 2 and 25, incorporate the invention defined by claims 10 and 11 of the patent in suit and constitute an infringement of said claims.

5. Plaintiff is entitled to a judgment against

defendants for general damages which plaintiff may have sustained as a proximate result of infringement of claims 10 and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by section [75] 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

6. Plaintiff is entitled to an injunction against further infringement by defendants and those controlled by defendants.

7. Plaintiff is entitled to an accounting from defendants Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid determination of issue of plaintiff's damages resulting from infringement by defendants of claims 10 and 11 of the patent in suit.

8. Plaintiff will recover costs from the defendants, to be taxed by the Clerk.

9. Plaintiff's second cause of action, asserted in the complaint, and defendants' counterclaim, asserted in the second amended answer and counterclaim, are hereby dismissed.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed January 31, 1951. [76]

In the United States District Court for the
Southern District of California, Central Division
Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COMPANY,
a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
Doing Business as SIGNAL MANUFACTUR-
ING COMPANY,

Defendants.

INTERLOCUTORY JUDGMENT

This cause came on to be heard at the October, 1950, term and was tried in open court on October 31, November 1, 2 and 3; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That United States Letters Patent No. 1,947,834 granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber for Flare Signal, is good and valid in law as to claims 10 and 11 thereof.
2. That said Patent No. 1,947,834 is invalid in law as to claims 1 to 9, inclusive, and 12 to 23, inclusive, thereof.
3. That Plaintiff, The Kilgore Manufacturing Company, a corporation, is possessed of the full and entire right, title and interest in and to said Letters Patent, together with the rights of action for past infringement thereof.

4. That Defendants, Signal Manufacturing Company, and [78] Charles Schneider, doing business as Signal Manufacturing Company, have infringed claims 10 and 11 of said Letters Patent No. 1,947,834 by making and selling flare signals exemplified by Exhibits 2 and 25.

5. That Plaintiff, The Kilgore Manufacturing Company, recover of the Defendants, Signal Manufacturing Company, and Charles Schneider, doing business as, Signal Manufacturing Company, for all damages which Plaintiff may have sustained as a proximate result of the infringement of claims 10 and 11 of said Letters Patent No. 1,947,834, at any time subsequent to the 1st day of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

6. That this cause be referred to Howard V. Calverly, Esq., as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, with directions to hear the accounting as to profits derived by Defendants from infringement of claims 10 and 11 of Letters Patent No. 1,947,834, and to hear all other relevant evidence on the issue of Plaintiff's damages to be assessed pursuant to Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70, and to report to the Court his findings of fact and conclusions of law with respect to assessment of damages arising from said infringement.

7. That Plaintiff will recover costs of the Defendants, to be taxed by the Clerk.

8. That decision on Plaintiff's prayer for increased damages and attorneys' fees and determination of costs will be reserved until after determination of issue as to Plaintiff's damages.

9. That a perpetual injunction be issued out of and under the seal of this Court restraining the Defendants, Signal Manufacturing Company, and Charles Schneider, doing business as Signal Manufacturing Company, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal [79] notice or otherwise, from directly or indirectly making, using, or selling or causing to be made, used or sold, any signal flares embodying the invention claimed in claims 10 and 11 of said Letters Patent No. 1,947,834, and specifically from directly or indirectly making, using or selling or causing to be made, used or sold, signal flares exemplified by Exhibits 2 and 25 herein, and from in any way infringing on said claims 10 and 11, or upon the rights of Plaintiff under said claims.

10. That plaintiff's second cause of action asserted in complaint and defendants' counter-claim asserted in the second amended answer and counterclaim, are hereby dismissed.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Judgment entered Feb. 1, 1951.

[Endorsed]: Filed Jan. 31, 1951. [80]

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a Corporation, and CHARLES SCHNEIDER, Doing Business as SIGNAL MANUFACTURING COMPANY,

Defendants.

INJUNCTION

The President of the United States of America to Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the Judgment by personal notice or otherwise,

Greeting:

Whereas, by an Interlocutory Judgment entered herein on January 31, 1951, it appears that United States Letters Patent No. 1,947,834, in suit, is valid and infringed as to claims 10 and 11 thereof, and by said Judgment the Plaintiff was allowed an Injunction against Defendants, their officers, agents, servants, employees and attorneys, and upon those

persons in active concert or participation with them who receive actual notice of the Judgment by personal notice or otherwise; [82]

Now, Therefore, we do hereby command and strictly enjoin you, the said Signal Manufacturing Company and Charles Schneider, doing business as Signal Manufacturing Company, your officers, agents, servants, employees and attorneys, and those persons in active concert or participation with you, from making, using or selling, or causing to be made, used or sold, any signal flare embodying the invention claimed in claims 10 and 11 of said Letters Patent No. 1,947,834, and specifically from directly or indirectly making, using or selling, or causing to be made, used or sold, signal flares exemplified by Exhibits 2 and 25 herein, and from in any way infringing on said claims 10 and 11, or upon the rights of Plaintiff under said claims, which commands and injunctions you are respectfully required to observe and obey.

Hereof fail not, under penalty of the law thence ensuing.

Witness the Honorable William C. Mathes of the United States District Court for the Southern District of California, Central Division, this 14th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk U. S. District Court, Southern District of California.

By /s/ WM. A. WHITE,
Deputy Clerk.

Approved as to form:

C. A. MIKETTA,

W. W. GLENNY,

.....,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 16, 1951. [83]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Signal Manufacturing Company and Charles Schneider, defendants herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree entered in this action on February 1, 1951, in this cause.

Dated: Los Angeles, California, this 16th day of February, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

[Endorsed]: Filed Feb. 17, 1951. [86]

[Title of District Court and Cause.]

CONCISE STATEMENT OF DEFENDANTS-APPELLANTS' POINTS ON APPEAL PURSUANT TO F.R.C.P. 75(d)

Now come the defendants - appellants, Signal Manufacturing Company and Charles Schneider, and in accordance with Rule 75(d) of the Federal Rules of Civil Procedure, make the following concise statement of points on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered February 1, 1951, in this cause:

1. The Court erred in holding that claims 10 and 11 of United States Letters Patent No. 1,947,834, issued February 20, 1934, are valid and in failing to hold that said claims are invalid:

(a) For lack of invention in view of the prior art. [87]

(b) For lack of invention over other claims admitted to be invalid by plaintiff.

(c) For failure to include elements admittedly necessary to produce an operative device.

(d) For failure to define the purported invention with the precision required by R. S. 4888, 35 USC §33.

(e) Because the claims are for an aggregation of old elements performing their normal and known function, without a new result.

(f) Because they cover more than was allegedly invented by the purported patentees.

2. The Court erred in holding that defendants infringed claims 10 and 11 of Patent No. 1,947,834. The Court erred in holding that the infringement was conscious, wilful and deliberate.

3. The Court erred in failing to make findings of fact from which the basis of decision as to claims 10 and 11 can be understood by the Court of Appeals, and in failing to adapt and include findings as proposed by defendants.

4. The Court erred in finding that the combination of claims 10 and 11 embodies invention without stating what the purported invention consists of, and in disregarding the admissions of plaintiff as to what the patentees of the patent in suit allegedly invented. [88]

5. That the Court erred in holding that plaintiff recover damages and costs from defendants and in failing to award costs, disbursements and attorneys' fees to defendants and counter-claimants as prayed for.

6. The Court erred in failing to find that plaintiff unnecessarily delayed proceedings, made misleading and contradictory representations, attempted to repudiate plaintiff's admissions and unnecessarily prolonged trial and imposed an unconscienable burden on defendants.

Dated: Los Angeles, California, this 19th day of February, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 19, 1951. [89]

[Title of District Court and Cause.]

**DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY DEFENDANTS-APPEL-
LANTS**

Defendants-Appellants in the above-entitled action, in conformity with Rule 75(a) of the Federal Rules of Civil Procedure, hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal:

- (1) Complaint.
- (2) Answer (filed December 19, 1947).
- (3) Stipulation (filed December 13, 1948).
- (4) Pretrial Stipulation (filed January 14, 1949).
- (5) Order Allowing Filing of Second Amended Answer and Counterclaim (filed December 21, 1949). [91]
- (6) Second Amended Answer and Counterclaim

(lodged December 9, 1949, filed December 21, 1949).

(7) Answer to Defendants' Counterclaim (filed March 22, 1950).

(8) Findings of Fact and Conclusions of Law (proposed by Plaintiff), (lodged November 9, 1950).

(9) Defendants' Objections to and Revision of Findings of Fact and Conclusions of Law as Proposed by Plaintiff (filed November 14, 1950).

(10) Petition for Rehearing (filed November 14, 1950).

(11) Interlocutory Judgment (including page 3 as revised by the Court), January 31, 1951, (entered February 1, 1951).

(12) Findings of Fact and Conclusions of Law of January 31, 1951.

(13) Injunction, dated February 14, 1951.

(14) Notice of Appeal (filed February 17, 1951).

(15) Concise Statement of Defendants-Appellants' Points on Appeal Pursuant to FRCP 75(d).

(16) The following portions of the reporter's transcript of the pretrial proceedings held December 13, 1948:

[See Pre-Trial Proceedings pages 84 to 88 of this Printed Record.] [92]

(17) The following portions of the reporter's transcript of proceedings during trial beginning October 31, 1950:

[Paragraph 18 of this designation contains several narrative statements and page and line numbers of the Original Reporter's Transcript of Testimony supporting these statements. See Proceedings, pages 88 to 187 of this Printed Record.]

(18) The following portions of the reporter's transcript of the proceedings held January 8, 1951:

[See pages 88 to 187 of this Printed Record.]

(19) The following defendants' exhibits:

A. File history and contents of patent No. 1,947,834.

B. Analysis of claims.

E. General Rules and Regulations for Vessel Inspection, May, 1947.

F-1 to F-32. Book of prior art patents.

G. Admissions.

H-A. Projectile case.

H-B. Base cap.

K-1. Enlargement.

K-2. Enlargement.

(20) The following plaintiff's exhibits:

No. 2. Defendants' flare.

No. 7. Plaintiff's flare.

No. 25. Defendants' flare cut away.

No. 28. Plaintiff's flare cut away.

No. 31. Plaintiff's catalog.

(21) This Designation of Contents of Record on Appeal by Defendants-Appellants.

Dated: At Los Angeles, California, this 14th day of March, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for

Defendants-Appellants.

Service and Receipt of Copy acknowledged.

[Endorsed]: March 14, 1951. [100]

[Title of District Court and Cause.]

ORDER

Upon motion of counsel for defendants-appellants and in view of plaintiff's request for time to file counter-designation.

It Is Hereby Ordered:

That the time within which defendants-appellants shall docket their appeal with the Clerk of the Court of Appeals for the Ninth Circuit is hereby extended up to and including April 12, 1951.

Dated this 26th day of March, 1951.

/s/ WM. C. MATHES,

Judge, U. S. District Court.

[Endorsed]: Filed Mar. 27, 1951. [104]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 7693-WM-Civil

Honorable William C. Mathes, Judge Presiding.

THE KILGORE MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF
PRE-TRIAL PROCEEDINGS

Monday, December 13, 1948

Appearances:

For the Plaintiff:

HAROLD W. MATTINGLY, ESQ.,
WARREN H. F. SCHMEIDING, ESQ.

For the Defendant:

C. A. MIKETTA, ESQ.

* * *

The Court: What is the status now as to the
claims in issue?

Mr. Mattingly: Claims 1 through 5 and claims
7 through 11, inclusive, only.

The Court: Claims 1 to 5, inclusive, and 7 to 11, both inclusive?

Mr. Mattingly: That is correct, your Honor.

The Court: What about 15 and 16?

Mr. Mattingly: Those have been withdrawn.

Mr. Miketta: They admit that we do not infringe them, your Honor.

Mr. Mattingly: That is contained as part of the answer to one of the defendant's requests for admission, that 15 and 16 will not be relied upon.

The Court: Very well. As far as limiting the prior art patents it is very difficult to do, but if any substantial number are necessarily included, I can always take that into consideration in fixing attorneys' fees.

* * *

Mr. Miketta: Well, your Honor, I would be very happy to do that if the plaintiff would answer that one request of mine and point out which is the novel element which they claim is the invention of this patent. When you come back with an answer that is a page long, which says everything that is in the claim, that is not an answer to that sort of a request. And how can we determine in advance what we are going to rely on as an anticipation if they do not disclose what is the [9*] novel element?

* * *

The Court: The statute says the claim itself in issue is supposed to tell you; so you do not have to ask anyone what the invention is. [10]

Mr. Miketta: That is my contention, your Honor, but Mr. Schmeiding did make a statement during our pre-trial conference which I think, if it could be re-expressed here and made a part of the formal stipulation, would permit me to limit the patents very materially, and that was a statement as to what you believe to be the invention, Mr. Schmeiding.

Mr. Schmeiding: If your Honor please, the claims of this patent are directed to a combination of elements. It is not just one new element that is the patentable feature of this patent. We do have a new element, but this new element is used in combination with old elements.

The Court: Do you care to state what the new element is?

Mr. Schmeiding: Yes. I believe I did that in my answer to his admission. I said the new element was a one-piece projectile shell including relatively thin side walls and a heavy base.

The Court: That, combined with the number of old elements, make what the patentee and the plaintiff claim to be a new combination?

Mr. Schmeiding: That is right. It is a combination of this new element with the old elements that make a new combination. We get a different result. [11]

* * *

The Court: It is stated here on the record. It is stipulated, I take it, gentlemen, that all the proceedings had here upon this pre-trial hearing shall be

deemed a part of the proceedings upon the trial?

Mr. Miketta: Yes, your Honor.

* * *

The Court: Is it so stipulated on behalf of plaintiff?

Mr. Mattingly: Yes, your Honor. [12]

* * *

Mr. Miketta: There is one other stipulation that I think we should be able to enter into, Mr. Mattingly, and that is this: That the drawings and recitals appearing in each of the United States Letters Patent cited as in the first amended answer were actually known in this country to others, and they are *prima facie* true as to the dates of the applications of each of those letters patent.

Mr. Mattingly: As to all of the United States Patents [16] I think we can stipulate. As to the foreign patents, I reserve—

Mr. Miketta: I excluded the foreign ones.

Mr. Mattingly: We will be glad to stipulate as to that with regard to all the United States patents.

* * *

[Endorsed]: Filed Jan. 13, 1949. [17]

[Title of District Court and Cause.]

REPORTERS' TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Tuesday, October 31, 1950

Appearances:

For the Plaintiff:

WARREN H. F. SCHMIEDING, ESQ.,
WM. EDWARD HANN, ESQ.

For the Defendant:

CASIMIR A. MIKETTA, ESQ.

* * *

Mr. Schmieding: No. 2 is defendant's flare.

The Court: Exhibit 2 is defendant's flare?

Mr. Schmieding: And No. 7 is plaintiff's.

* * *

The Court: Very well, Exhibits 2 and 7 for identification will be received into evidence.

* * *

Mr. Miketta: May it please the court, I would like to introduce right at the beginning as Defendants' Exhibit A the complete file history and contents of the patent in suit No. 1,947,834, which was issued in 1934 on an application filed September 19, 1931. [18*]

* * *

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Received into evidence as Defendants' Exhibit A.

* * *

Mr. Schmieding: That is merely a copy. I have here a certified copy which I would like to offer into evidence as Plaintiff's Exhibit 23, certified copy of the patent.

* * *

Mr. Miketta: I would also like to introduce into evidence for your Honor's use an analysis of the claims in suit which breaks down the claims to their various elements, this chart or tabulation being worded in precisely the language of the claims but breaking them down in graphical form so your Honor can get the difference between the claims much more quickly, as Defendant's Exhibit B. [19]

* * *

The Court: Received into evidence.

* * *

Mr. Miketta: Yes, we have. As Defendant's Exhibit C I would like to introduce into evidence claim 1 of the patent in suit in parallel comparison with claim 2 which appears in the application and which was solicited by the patentees, Driggs and Faber, and then cancelled, so that your Honor can compare the scope of the cancelled claim with the scope of claim 1 of the patent in suit, which claim I believe is the broadest.

* * *

The Court: Received into evidence. [20]

* * *

Mr. Miketta: As Defendant's Exhibit D I would like to introduce into evidence the General Rules and Regulations for Vessel Inspection approved by the United States Coast Guard and issued by them, as a matter of fact, dated August, 1943.

* * *

The Court: Received into evidence.

Mr. Miketta: And as Defendant's Exhibit E, the General Rules and Regulations for Vessel Inspection (Ocean and Coastwise) issued in May, 1947.

* * *

The Court: Received into evidence.

* * *

Mr. Miketta: As Defendant's next exhibit, Exhibit F, I would like to introduce copies of all of the prior art patents and publications upon which defendant is relying, [21] with index thereto, constituting Exhibits F-1 to F-32.

* * *

The Court: Received into evidence.

Mr. Miketta: As Defendant's Exhibit G, I would like to introduce into evidence at this time the various admissions made by plaintiff in response to defendant's requests and interrogatories. [22]

* * *

The Court: Very well, the document will be received as Defendant's Exhibit G in evidence. It comprises requests for admissions and the interrogatories and the responses thereto?

Mr. Miketta: That is correct, your Honor. [23]

* * *

DEPOSITION OF ARTHUR F. HUBBARD

[Narrative statements and portions of the Reporter's Transcript of Proceedings designated by the Defendants-Appellants.]

The following narrative statement:

Plaintiff then read into the record a deposition of Arthur F. Hubbard, taken on May 19, 1949, at Columbus, Ohio. Arthur F. Hubbard testified that he resides at Stuart, Florida, and from April 1, 1929, was employed as president of International Flare Signal Company until about 1930, at which time consolidation took place with Kilgore Manufacturing Company; that he had charge of development, manufacture and sale of products sold by International Flare Signal Company. After consolidation, he was vice-president of the Kilgore Manufacturing Company in charge of the International Flare Signal Division until the end of 1945, when he retired.

Hubbard stated that plaintiff's Exhibit No. 5 for identification was a signal cartridge put out by plaintiff, and known as a No. 52 signal when he was with the company. To the best of his recollection manufacture of that signal started around 1934 and no essential changes were made since, although he could not categorically say that there were two gas checks between the signal candle and parachute.

Hubbard stated that both International and Kilgore paid royalties to Driggs and Faber under Patent No. 1,947,834.

The Court: The presumption will be indulged

(Deposition of Arthur F. Hubbard.)

that the court considers only competent evidence.
You may proceed.

* * *

Mr. Schmieding: "Q. Did the International Flare Signal Company or Kilgore sell these flares?

* * *

"A. Many, many thousands of them, yes.

"Q. Do you know to whom they sold them?

"A. Oh, yes. We sold them to the Coast Guard, United [44] States Coast Guard. I think they were one of the first customers we had for this type of flare. We also sold them to the steamship operators and to and through the ship chandlers through the country. Of course the sales to the ship chandlers and to the steamship companies were made after we received approval from the government for our flare."

Mr. Miketta: I objected to that, your Honor, on the ground that there was no foundation laid, not the proper method of proof; and furthermore, on the ground that the question was indefinite and vague, the particular type of flare or the construction of the flare not being identified. The witness subsequently testified that there were a great variety of flares, and therefore the vagueness is apparent.

* * *

Mr. Miketta: Yes, I asked a question of "like." I brought out that point.

"Is it not a fact that there were various styles or types [45] of signal that were manufactured by

(Deposition of Arthur F. Hubbard.)

Kilgore Manufacturing Company and International Flare Signal Company?

“The Witness: Oh, yes.”

That was the basis of my objection, your Honor.

The Court: Yes.

Mr. Miketta: That it was vague and indefinite and it was not a proper method of proof.

The Court: Overruled. [46]

* * *

The following narrative statement:

Hubbard stated that flares “practically identical” to Exhibit 5 were approved by governmental agencies in 1933 or 1934, and that information thereon should be in the Kilgore files. He stated that he had been in the pyrotechnic business since 1921 and prior to Kilgore’s development of a flare like Exhibit 5 the only signal that was a prescribed requirement for lifeboats was a two-minute, scratcher-type hand signal. After Kilgore, in collaboration with the Coast Guard, developed different types of signals and flares for their use, Kilgore thought there may be a market for a signal of this type for lifeboats. Tests were conducted with the Bureau of Marine Inspection and Navigation and they made a requirement that ships of American registry carry an approved pistol and signal flare. Certain functional characteristics were prescribed. The witness said that he doesn’t say that no other signal made differently would not receive approval; in fact, others received approval.

(Deposition of Arthur F. Hubbard.)

Upon cross-examination, Hubbard testified as follows:

Mr. Hann: "By Mr. Miketta:

"Q. How does this Mr. Baack spell his name?

"A. B-a-a-c-k.

* * *

"Q. At the time Mr. Hubbard that you were obtaining approval of a flare, was that a parachute type flare? A. Yes, this is a parachute type.

"Q. You say the Bureau of Marine Inspection and Navigation was the one that issued the approval at that time? [56]

"A. The Board of Supervising Inspectors of the Bureau of Marine Inspection and Navigation.

"Q. They conducted tests? A. Yes, sir.

"Q. You submitted flares to them?

"A. Yes, sir.

"Q. There were some tests on Coast Guard cutters, did you say?

"A. I am sure at least one of the tests was made on Coast Guard Cutters. That was, I believe, in Chesapeake Bay. Another test made out of New York, I think, was made off of commercial tugs out there.

"Q. Was that attended by any of the members of the Bureau?

"A. The entire Board of Supervising Inspectors, so far as I recall.

"Q. They turned in a report on that, and approved your flare? A. They did.

"Q. Did you have to submit to them the details

(Deposition of Arthur F. Hubbard.)

of the construction or specifications of the flares that you were going to manufacture?

“A. We had to provide them with a set of drawings representing the flare that was approved by them, and they signed or sealed that set of drawings. I think we had it in duplicate [57] and it would all be ribbon and the government seals on it.

“Q. You saw copies of the reports that were rendered by the Bureau of Marine Inspection and Navigation and that Board of Supervising engineers? A. I did.

“Q. Are those records and those drawings and copies of them, probably in the Kilgore Manufacturing Company files?

“A. They were up until the time I left the company.”

Mr. Miketta: At that time, your Honor, objection was made “to the hearsay testimony of the witness regarding the approval of an unidentified flare, since it appears that the drawings and specifications as well as the reports of tests were in documentary form and were in the files of the Kilgore Manufacturing or of the International Flare Signal Company at the time that the witness retired in 1945.”

It certainly is not the proper method of proof to rely on such hearsay testimony when positive records of identification are available.

The Court: Overruled. [58]

(Deposition of Arthur F. Hubbard.)

Mr. Hann: "Q. Is it not a fact, Mr. Hubbard, that a good many of the earlier flares that were manufactured and sold by Kilgore Manufacturing Company and International Flare Signal Company, did not include this outstanding flange or lip on the bottom cartridge case or cartridge shell, into which the projectile case is held?"

"A. That is true but—not that particular type of signal. We made other types of signals that had the different characteristics you just mentioned?"

"Q. The other characteristic I mentioned is the provision of an annular groove in there instead of the flange? A. That is one type. [59]

* * *

"Q. May I rephrase the question, Mr. Hubbard?

"Kilgore did manufacture some sort of a signal flare provided with a cartridge case which had a groove near the base instead of this flange?"

"A. They did.

"Q. Is it your contention that they never manufactured a parachute type of flare with that groove in the bottom of the cartridge case?"

"A. Oh, they made many thousands of them.

* * *

"Q. When the cartridge case is provided with a flanged bottom, then it is to be used as a breech-loading flare? A. That's correct.

"Q. In a breech-loading gun?"

"A. That is right. [60]

(Deposition of Arthur F. Hubbard.)

“Q. When it has the annular groove near the bottom, then it is a muzzle-loading flare?

“A. That is essentially correct. The only exception I would make to that, one time we did develop a pistol that would receive that one through the annular groove with the breech, but the last——

“Q. You did sell parachute type flares provided with a cartridge case in the bottom having a groove in it?

“A. Not a cartridge case at the bottom. The only one that I can recall was a cartridge case that completely enclosed the projectile case instead of that short cartridge case that is shown there. The projectile case, however, that of that one you are bringing into the picture, is identical with that one there.

“Q. In other words, the projectile shell or case with its contents was the same whether you had a cartridge case bottom on it provided with a flange or with an annular groove?

“A. Except in the, perhaps the case of sales made to the United States Government, where we had to abide by their drawings and specifications. There there may have been some minor changes, but essentially it was the same thing.

“Q. Those drawings and specifications were not enforced until about 1934 and 1935, is that correct?

“A. Well, I would say at that time, until we received [61] the approval from the United States Department of Commerce, that is the Bureau of Marine Inspection and Navigation, that there were

(Deposition of Arthur F. Hubbard.)

no government specifications in force or otherwise in effect.

“Q. What were those specifications to which you had to abide, Mr. Hubbard?

“A. In what respect—the one with the annular groove, or this one?

“Q. You mentioned specifications that you had to conform to. I am trying to find out what specifications you have in mind?

“A. I have in mind the specifications that would be involved by that particular type of signal, that was approved by the Bureau of Marine Inspection and Navigation for use on commercial steamships.

“Mr. Schmieding: The witness points to Exhibit 5.

“Q. What were those specifications?

“A. Well, in our particular case, they applied only to the drawings that represented the type of signal that was approved by the Bureau. Subsequently other people came in with other types of signals that possessed essentially the same functional requirements as far as the specifications that were set down by the Bureau were concerned, and I presume that they had to have their drawings approved by the Bureau the same way that we did.” [62]

* * *

Mr. Hann: “Q. Were those specifications in writing at that time?

“A. The regulations at the time of the approval as I recall, the requirements involved, were not

(Deposition of Arthur F. Hubbard.)

specifications governing the manufacture of the signal. They were merely performance specifications that were involved.

“Q. Were those specifications in writing?

“A. Yes, they were made a part of the regulations.

“Q. They are probably still in the files of the Kilgore Company?

“A. Yes. As a matter of fact, they are published all the time in different government digests.”

Mr. Miketta: I move to strike the witness' testimony as to his conclusions and opinions as not the proper method of proof, since the documents themselves should be adduced in evidence if they are to be relied upon by the plaintiff. [63]

* * *

Mr. Miketta: I was developing the fact if there were documents in existence, so as to give me basis for the motion to strike what appears on page 12, line 26, to page 15, line 25, adduced during the direct examination.

The Court: The motion is denied.

Mr. Hann: “Q. I understand you to say Mr. Hubbard, that before the Kilgore Manufacturing Company and Messrs. Driggs and Faber made the invention of the patent in suit No. 1947834, the only prior signal used in marine work was this, as you call it, a scratch type?

“A. Hand type of signal. [64]

* * *

(Deposition of Arthur F. Hubbard.)

“Q. But it would not eject any signal to any height?

“A. That is correct. There were signals manufactured at that time, prior to that time, that could be projected, but not the parachute type of signal. In World War I there was what they called the Very Pistol; you shoot a star in the air.

“Q. You are familiar with the Very Pistol and the star shells?

“A. Star shells were not pistol operated.

“Q. It is your contention that there were no parachute type flares prior to the invention allegedly made by Driggs and Faber in the patent in suit?

“A. No; I don’t say that, but they had never been offered commercially. There were parachute signals made prior to that time of a sort. [65]

* * *

“Q. Incidentally, how long is the flare candle of the flares manufactured by Kilgore? [66]

“A. Of that type?

“Q. Yes.

“A. I couldn’t tell you from memory, sir.

“Q. Has it ever varied in size?

“A. On that type of signal?

“Q. Yes, on a parachute type of flare.

“A. Well, there are many different types of parachute signals and parachute flares, probably a dozen or more different kinds. They make para-

(Deposition of Arthur F. Hubbard.)

chute flares, or made parachute flares that were maybe 30 or 36 inches in length.” [67]

* * *

The following narrative statement:

Hubbard also testified that parachutes were made of Japanese or domestic paper and the size of the parachute influences the rate at which a burning flare will descend; that a parachute must be balanced with the rest of the item to minimize oscillation or swinging, which may spill air out of the parachute and cause rapid descent. The proper length, diameter and pyrotechnic composition is required to give the functional burning characteristics required by Government regulations.

* * *

“Q. Do you know—incidentally, I will just ask you this question—do you know whether the patent in suit describes or gives the composition to be used in the flare itself, in the flare candle itself?

“A. It doesn’t give the specification for the composition. I am quite sure of that.

“Q. It doesn’t tell you what ingredients to use?

“A. No, I don’t think so, as I recall it.

* * *

“Q. Let me rephrase it.

“Is it not a fact that the outside diameter of the projectile case or shell of a flare such as Exhibit No. 5 here before us, is actually determined and established by the government specifications on the pistol which may be used?

“A. That would be a limiting factor. [71]

(Deposition of Arthur F. Hubbard.)

“Q. You can’t make it any bigger than the bore?

“A. Of the approved pistol.

“Q. Similarly, the approved pistol specifications call for a certain chamber bore which establishes the maximum diameter of the cartridge case used in the flare such as Exhibit 5?

“A. That is correct.

“Q. And the two most important elements in the flare as far as length are concerned, are the candle and the space occupied by the parachute, isn’t that correct?

“A. That is correct, but there is no definite—not necessarily any limitation on the length of your projectile. You can have that sticking out the muzzle of the pistol six inches if you wanted to.

* * *

“Q. That height to which the projectile case or shell is ejected, depends upon the charge which is placed in between the cartridge, bottom of the cartridge case, and the bottom of the projectile shell?

“A. Largely.

“Q. What other factor influences that?

“A. The weight and the balance of your projectile [72] case. If it tumbles excessively on the way up you are apt to cut down your height of projection. If there is a bad fit in it, improper fit in the pistol that allows excessive gas leakage, you are apt to get some reduction in the height of projection, but essentially it is the propelling charge in the base of the cartridge case.

(Deposition of Arthur F. Hubbard.)

“Q. In other words, the amount and the character of the powder?

“A. Oh, yes, the character of the powder in there is a very definite factor. Smaller grains have different factors than larger grains. [73]

* * *

“Q. Did you ever make any sales personally to this man Baack?

“A. I didn’t make the sales to Billy Baack. I made them to Mr. Becherer who is president of the Coston Supply Company; many, many thousands of them.

“Q. Are records kept of those sales by the Kilgore [75] Manufacturing Company?

“A. Oh, yes; they were up to the time I left the company.

“Q. That is true of all sales then?

“A. That’s right.” [76]

* * *

The following narrative statement:

Hubbard identified plaintiff’s Exhibit 7 as a No. 52 red parachute signal and stated that the number was based upon Supplement 52 of the Regulations of the Bureau of Marine Inspection and Navigation; that Kilgore uses about thirty to forty different numbers to identify different flares.

Hubbard testified that sales records at Kilgore were under his subordinate, but that Hubbard had knowledge of sales since the company had no salesmen up to the time he left the company and all trade contacts were made by him.

DEPOSITION OF GEORGE N. HATCH

[Narrative statements and portions of Reporter's Transcript of Proceedings designated by the Defendants-Appellants.]

Deposition of George N. Hatch, taken May 19, 1949, at Columbus, Ohio, was read into the record. Hatch testified that he has been in the employ of Kilgore Manufacturing Company since September 15, 1945, as sales manager of International Flare Signal Division. Previously Hatch had been an inspector of ordnance material for the War Department and a field representative on the Bomb and Pyrotechnic Branch. In 1943 he visited Kilgore and International and was not particularly interested in signal flares and therefore could not say that plaintiff's Exhibit 5 was identical to what he saw at the Tipp City plant in 1943. To his personal knowledge, flares like Exhibit 5 have been manufactured since 1946, when their sale came under his jurisdiction. Some changes in manufacture had been made since 1946; that in 1948 a new specification issued requiring use of sealing composition between the projectile and shell casing, a coat of lacquer on the top and placement of each signal in an individual bag.

Hatch read a list of names of companies taken from Kilgore shipping records to whom No. 52 flares had been shipped during 1944, 1945 and 1946; he testified that approximately 6,000 dozen flares were sold in 1944 and 1945; and 1,619½ dozen in 1946.

(Deposition of George N. Hatch.)

The 1946 list was taken from invoices by a billing clerk.

* * *

Mr. Miketta: "Mr. Miketta: The testimony of this [93] witness regarding the alleged sales is objected to as not the proper method of proof. The original records speak for themselves."

* * *

The Court: I will overrule the objection at this time. [94]

* * *

The following narrative statement:

Hatch testified that there are standard specifications and blueprints followed by the manufacturing department of Kilgore for each of the variously numbered flares, giving instructions as to type of flare, composition to be employed, type of expelling charge, etc.

* * *

Mr. Miketta: "Now, to the best of your present recollection was the 1943 No. 52 signal flare identical to Exhibit 5?

"A. I can't answer that question because of this reason, that in 1943 when I visited the Tipp City plant of the Kilgore Manufacturing Company for the International Flare [103] signal division, I was not particularly interested in this unit from my official standpoint. I was interested in it purely out of curiosity. I would say that from looking at Exhibit No. 5 and comparing Exhibit No. 5 with what I observed in Tipp City in 1943, it is just

(Deposition of George N. Hatch.)

about identical. Now, I couldn't say that it is absolutely identical."

The Court: Is that "no" or "now"?

Mr. Hann: "No." Change it to "no." [104]

* * *

CHARLES SCHNEIDER

called as a witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Charles Schneider.

Direct Examination

By Mr. Schmieding:

Q. Mr. Schneider, you are the defendant in this cause of action? A. Yes. [139]

* * *

I ask this certified copy of United States Coast Guard as to tests on parachute flares, sheets 1, 2, 3, and 4, be marked for identification Plaintiff's Exhibit No. 26.

* * *

Mr. Miketta: There is, your Honor. In the first place, those tests are not properly certified. Secondly, they relate to tests which were carried out after the filing of the action here. I do not see that they are pertinent. Either the plaintiff has a cause of action for acts of the defendant after July 7th and prior to October 16, 1947, or they have not. [145]

* * *

(Testimony of Charles Schneider.)

Mr. Schmieding: The tests are required by the Coast Guard in order to obtain the Coast Guard's approval. All life signals of this type must be approved by the Coast Guard, and Coast Guard at times pick up at random flares from each manufacturer and they make a test on those flares and see whether they meet certain specifications that are required. [147]

* * *

Mr. Schmieding: I would like to have marked for identification a certified copy of a paper of the U. S. Coast Guard dated May 2, 1949, the title of it is: "Subject: faulty pistol projected parachute red flare distress signals manufactured under Coast Guard approval No. 160.024/5/0 by Signal Manufacturing Company, Los Angeles, California." I would like to have it marked for identification.

* * *

Mr. Schmieding: I offer in evidence this paper as Plaintiff's Exhibit No. 27.

The Court: Is there objection?

Mr. Miketta: There is an objection to that, your Honor, on the ground that it pertains to matters subsequent to the filing of the complaint in this action, in the first place. Secondly, that it is not a complete story. There was a subsequent bulletin issued which showed that the difficulty lay in the pistols, some of which were manufactured by the Kilgore Company, the plaintiff herein.

The Court: That would go to the weight of it, would it [150] not?

(Testimony of Charles Schneider.)

Mr. Miketta: That is correct, your Honor. My primary point is that these are acts after the filing of the complaint, and therefore cannot be used to predicate a cause of action going back to 1947.

The Court: The objection is overruled. Exhibit 27, for identification is received in evidence.

* * *

Cross-Examination

By Mr. Miketta:

* * *

Q. But the aluminum projectile cases and the aluminum base caps are manufactured for you by the Aluminum Company of America, is that correct?

A. That is correct.

Q. Can you produce the cap and a case which is made for you and used by you in the manufacture of flares? A. That's correct. [151]

* * *

Mr. Miketta: The H-A for the projectile case, your Honor, and the H-B for the base cap.

The Court: By base cap you are referring to the cartridge case?

Mr. Miketta: Yes.

* * *

The Court: Received in evidence, Exhibits H-A and H-B, for identification, received in evidence.

Q. (By Mr. Miketta): The projectile case, Exhibit H-A, is in a partly covered form and includes a delay fuse eyelet and a gas check or washer, is that correct? A. Yes, sir.

(Testimony of Charles Schneider.)

Q. And that is the way it is used in your flares?

A. Yes, sir.

Q. And the shoulder of that eyelet which contains the delay fuse does not rest against the bottom of that projectile case, but instead rests against the washer, is that correct? A. Yes, sir. [152]

Q. And the base cap or cartridge is also in a partly manufactured form in that it includes the—what do you call that, the primer?

A. Cap.

Q. The firing cap itself?

A. I believe that is what they call it.

Q. And after whatever ejection charge is placed into the base cap, then the bottom portion of the projectile case, Exhibit H-A, is forced with a press fit into the cartridge case?

A. I believe that is the way it is done.

Q. Thank you. With reference to Plaintiff's Exhibit 27, which is this bulletin dated May 2, 1949, regarding faulty parachute distress signals, will you please tell us what actually transpired and whether or not that bulletin was superseded by a subsequent bulletin?

A. As to the first part, we were told that some of the flares had been returned because they were supposed to be faulty, and of course since they went through our inspection before they were shipped out it seemed unlikely, although such a thing could be possible, I suppose, so I went down to San Pedro in one case, and I brought along some gauges, chamber gauge and plug gauge, and at once, as soon

(Testimony of Charles Schneider.)

as I tried some—and also some of our pistols—and I tried the flares and found that they were not the flares, but that [153] the pistols were at fault.

Q. Why were the pistols faulty?

A. In one case there was a little nick that required no more than about a thousandth of an inch to prevent the flare from going in properly, there was a nick in the pistol, the pistol might have been handled carelessly, I don't know how it got the nick in it, because as soon as we put it in our pistol it fit, it was a new pistol that hadn't been handled. Then by using the gauges we found in that case, the first case, that it was the pistol at fault and not the flares. I went aboard with the Coast Guard inspector so that I would have the advantage of other opinion than mine. When the pistols were replaced they had no trouble, they kept the flares. That happened very quickly in about two or three—four, in fact, other occasions at San Pedro. Having had this first experience, I came prepared in the others. In one case the pistol was fouled, and in another case the dimensions were just simply faulty. There was nothing the matter with the pistol, it was a new pistol, but it wasn't made right, or something, because the dimensions were too small for a proper flare.

Q. Whose make pistol was that?

A. They were various makes. As I recall it—I have correspondence here if you want me to refer to it. One was Sedgley, and several of them were at least on two or [154] three occasions involving

(Testimony of Charles Schneider.)

about five or six pistols, they were International. There was a Sedgley and a Columbia and—there were several Columbias. Columbia pistols are no longer made. Approval has been withdrawn. There were several of those.

Q. In other words, all this difficulty was because either the pistol was improperly machined or had corroded, or something else was wrong with it, is that correct? A. That is correct. [155]

* * *

The Court: Exhibit 26 for identification is received into evidence. How often are these tests made, gentlemen?

* * *

The Witness: Whenever there is a lot manufactured.

The Court: In other words, every lot produced are sampled and tested, is that correct?

The Witness: That is correct. The Coast Guard requirements are that a certain number of flares are taken at random by the inspector out of a lot, that is, all manufactured, before they are shipped. So it is his duty to go into the lot and take these at random, a certain number of them.

Q. (By Mr. Miketta): Just to review this, may I ask a question here? In the course of these tests, Mr. Schneider, are we correct in this: The Coast Guard inspector takes these [157] grab samples out of a lot and then they fire them in a standard pistol

(Testimony of Charles Schneider.)

upwardly; they measure the altitude to which the flare has been projected; they measure the rate at which the parachute and its ignited flare drop; they determine the rate of descent that way; they observe whether the flare broke in half or something else happened to it, and time the length of burning while it is floating down; is that correct?

A. That is substantially correct. There are other—I will have to wait for a question.

Q. In addition to that, they also take samples of the candle itself and subject it to photo-metric tests to make certain that the color and the intensity of the light meets their specifications as published in their bulletins? A. That is correct.

Q. Is that correct? A. That is correct.

Q. And unless that particular set of grab samples has met their approval, they will not permit that shipment to go out, is that correct?

A. That is correct. If it is less than a minimum that they allow, they will reject the entire lot. [158]

* * *

Q. (By Mr. Miketta): And, of course, the same procedure as far as inspection and grabbing and scoring is concerned is carried out in every manufacturer's plant who manufactures flares of this type, is that correct?

A. I believe that is right. It should be. Yes, it is right. It applies to everyone the same.

The Court: How many manufacturers are there that you know of in the manufacture of this same type of flares?

(Testimony of Charles Schneider.)

The Witness: Flares—as far as I know, there are only two at the present time. [159]

The Court: Your company and the plaintiff here?

The Witness: That is correct.

* * *

Q. To your knowledge, what, you may say, percentage of your production within the past year has passed the Coast Guard inspection?

A. We have never had a lot, an entire lot, rejected. The percentage, scoring percentage, has been lately a hundred per cent and in some cases down around 99, but lately, though, they have been 100 per cent. [160]

* * *

Q. When was the last time you had a batch rejected?

* * *

A. We never had a batch rejected.

* * *

Q. (By Mr. Miketta): Now referring again to this Exhibit 27 and the faulty pistols, was there a subsequent bulletin published by the Coast Guard under the signature of J. F. Farley, Admiral of the U. S. Coast Guard? A. Yes, there was.

* * *

Mr. Miketta: May we have that marked for identification, please, as Defendants' Exhibit I.

* * *

The Court: Is Exhibit I for identification offered into evidence?

(Testimony of Charles Schneider.)

Mr. Miketta: Yes, your Honor.

* * *

The Court: Received in evidence. [161]

* * *

Q. And are we correct in this that the Coast Guard makes their inspections of the ship's complement and after a [163] pre-determined period of time, if they find flares on board which have been there for more than a given length of time, the ship owner is required to discard those and buy new ones? A. That is correct.

Q. And what is that period of time, do you know?

A. At the present time I believe it is three years. [164]

* * *

Mr. Schmieding: I would like to call Dr. Clauser.

HERBERT C. CLAUSER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [167]

* * *

The following narrative statement:

Clauser testified he is Director of Research and Development for Kilgore Manufacturing Company and in their employ since 1938. In 1924 he was chief chemist of Triumph Explosives Company at Elkton, Maryland, and stayed there till 1938. A parachute-type flare which met Coast Guard specifications was

(Testimony of Herbert C. Clauser.)

developed by Triumph Explosives and manufactured by it.

The Court: You would stipulate for the purpose of this case that Exhibit 3, for identification, and Exhibit 25, for identification, are defendants' flares or portions of them?

Mr. Miketta: That's right, your Honor, and the parts there found or shown were found by the witness. [173]

* * *

The Court: Plaintiff's Exhibits 3 and 25, for identification, are received in evidence.

Mr. Schmieding: Will you mark for identification as Plaintiff's Exhibit No. 28 this item?

Perhaps, your Honor, Mr. Miketta will stipulate to the fact that this also is a flare cut-away, but showing plaintiff's construction. [174]

* * *

The Court: Is that a longitudinal cross-section of a type of flare or signal currently being manufactured by the plaintiff in this action?

The Witness: Yes, sir.

* * *

The Court: Exhibit 28, for identification, is received in evidence. [175]

* * *

Q. (By Mr. Schmieding): Dr. Clauser, could you tell us the advantages, if any, of a projectile made of a one piece of drawn metal such as that shown in the patent?

* * *

(Testimony of Herbert C. Clauser.)

A. That is one of the things that has puzzled the other fellow for a number of years. That included myself. They are a specific advantage. First, it is light in weight. It is one-piece in construction of one of the lightest metals known. It is that part of the flare which is projected into the air at 150 feet or more, and it is projected with powder. It rests on the cartridge base which has powder in it which is ignited by a cap, and it is the force created by the burning of the powder that propels it. Now, that is in a state of confinement there and because it is wedged in there, because of the confinement that it has there, that pressure as it develops, it develops instantaneously, it will grow and [180] grow until something will give. Now, that one-piece construction there which cuts down the possibility of crevices, of any leakages and all that. For that reason it is an advantage. That one piece there, it is definitely the most fool-proof mechanical structure that we know of at this time, that is, for an item of that kind, in that there is no possibility, or there is a limited possibility for prematures. If that spit of that expelling charge gets by the delay or by the base, if it is a two-piece projectile, it will be premature and the whole business will explode right over your head and fall back on your body or in the boat and you have no signal. That is, it is exceedingly difficult to handle that, and, as a one-piece construction, over my years of experience I find definitely that, regardless, to be the very best construction for that purpose.

(Testimony of Herbert C. Clauser.)

Q. You spoke of "premature." What do you mean, Doctor, the premature explosion of the black powder 6 in the projectile?

A. In the projectile, yes, sir. The fire will blow the powder, that is, it will get in, it will get by the delay, that is, or any crevice. That must be absolutely fool-proof. It must be so arranged that a spit of fire or a spark of fire cannot go in, even under conditions of high pressure, because it will then ignite the expelling charge of the projectile prematurely. [181]

Q. You spoke about a crevice. What do you mean by that, Doctor?

A. I mean an opening through which a spark or powder can pass. You could have that, say, for instance, you would have welded a piece on the bottom there or put a plug in there with glue or your aperture would be poorly machined. That is just simply an aperture due to faulty mechanics or construction which would permit the passage of a spark.

Q. Has that integral projectile any advantage with respect to the black powder 6? And that also explodes, does it not, to eject the candle and the parachute?

* * *

A. I have already pointed out that because of its construction, that is, the projectile being lodged into that there cartridge case, wedged in there, and just as soon as that priming cap, igniting cap—more correctly called a percussion cap—functions,

(Testimony of Herbert C. Clauser.)

the powder explodes, and the moment of its explosion or what we call the initial impulse is terrific until something occurs, until more space, until you get more volume, until you get the equivalent of a chamber in there. So because of that terrific pressure, it is directly [182] under that delay, properly called a fuse, that takes a beating there and unless that is properly located there and properly anchored, why, that terrific pressure can blow right through the delay and cause a premature that way by blowing the delay right into the powder of the explosion charge.

The Court: What ignites the black powder in the projectile?

The Witness: In the projectile the black powder, the delay, sir.

The Court: With a fuse, the black powder?

The Witness: Yes, a fuse or delay.

The Court: What ignites the fuse, now?

The Witness: The fuse is ignited, that is, by the original explosion charge in the cartridge base.

The Court: Is that fuse so constructed—

The Witness: It burns very slowly.

The Court: It takes time to burn during the ascent of the projectile, is that it?

The Witness: There are two acts occur at the time of the explosion. One is to lift it up in the air and it is burning while it is going up, and it is presumed that the burning is completed when it reaches zenith. It is so timed.

Q. (By Mr. Schmieding): The fuse you are

(Testimony of Herbert C. Clauser.)

talking about is what is referred to in the patent as the eyelet 4 containing the black powder? [183]

A. Yes, sir.

* * *

Q. Doctor, after this projectile is in the air, the black powder 6 explodes to eject the flare and the parachute, that is correct? Is that right?

A. Yes, sir.

Q. Now, has the one-piece construction of the projectile any advantage at that time, at the time that the black powder 6 explodes?

* * *

A. That has relatively thin walls and heavier base, and when the powder, after the fire gets through, the delay or fuse gets into the powder, why, you again have that there same initial impulse of the explosion, so the walls of that tube—the walls of that tube, that is, we do know when you have a one-piece construction that is of the minimum weight, with weights being equal, that that has more strength. And also, in order to guard against that, why, there is an annulus ring that can be made of either wood or paper in the bottom which receives the powder. The purpose of that is to act as a cushion and in part prevent the possible mutilation, that is, of the blowing out or distorting of that there signal case. [184]

Q. You are referring to the wooden spacer 7?

A. Yes, sir.

Q. That annulus, is that what you mean by the ring? A. Yes, sir.

(Testimony of Herbert C. Clouser.)

Q. And that acts as a shock-absorber?

A. It acts as a shock-absorber, yes, sir; and it also does this, it acts as a spacer in as far as locating the flare is concerned and it also acts as a spacer as far as bringing the powder which does the final expelling into close proximity with your fuse or delay.

Q. Is it, then, the combination of this wooden spacer and the integral wall that prevents rupture of the projectile, the thin wall projectile case, is that what you understand?

* * *

A. Yes, sir, that is what I mean.

Q. And also, this wooden spacer limits the quantity of powder that can be contained within this lower area of the projectile case?

A. Yes, sir. And again, you can see that it is essential that that work be done limited to the minimum amount of powder to prevent mutilation. Yes, sir.

Q. This drawing shows black powder surrounding the left end of the fuse. Is there any advantage to that, Doctor? [185]

* * *

A. Well, the advantage there is sure fire; that is, it is a very tricky proposition to have a fuse or a delay that goes in there that is to do the igniting at all times, that is, to ignite at all times, unless it is properly constructed. [186]

* * *

(Testimony of Herbert C. Clauser.)

Q. (By Mr. Schmieding): Doctor, I notice that the left end of the eyelet 3, the fuse is reduced; is there any advantage to reducing that end of the fuse?

* * *

A. That is very, very important, because at the time at which the propulsion takes place, that is in the gun, as the cartridge—wait a moment. As this here powder—

Q. Black powder 35?

A. Black powder 35, yes, sir, at the time at which that explodes, as has already been pointed out, there is a terrific initial pressure exerted, that is on that fuse directly above it, and by having that fuse in there housed in the manner in which it is, and having it restricted by those elongated ends in there, it prevents, it keeps the force from the powder at the bottom from blowing right through and shooting before the projectile is lifted up to zenith.

The Court: What is that fuse composed of?

The Witness: It is an eyelet, brass or copper, brass primarily, but the composition within, your Honor, that is black powder compressed at a high pressure, with the addition of a little bit of wax to act as a binder, a very small percentage.

The Court: At the base of that fuse, that, is the end [187] which opens, if it does open, into the cartridge case, is the powder in that exposed, is that an open end?

The Witness: That is an open end, yes, sir.

(Testimony of Herbert C. Clauser.)

The Court: And when the black powder 35 is ignited by the firing cap 36, then the igniting of that black powder 35, in turn, ignites the powder in the fuse?

The Witness: That's correct, the expulsion and ignition take place simultaneously.

The Court: The gases eject the projectile?

The Witness: Yes.

Q. (By Mr. Schmieding): If you didn't have that restriction as shown in the patent, the explosion would blow the fuse powder out of the eyelet and cause pre-ignition of the black powder 6 in the projectile shell?

A. Yes, your projectile would not be catapulted to zenith. That is, in a case like that if it were premature the projectile case would stay in position, it would just blow the contents out.

Q. The flare in the parachute? A. Yes.

Q. And that would be dangerous in a boat?

A. Very dangerous in a boat.

Q. I notice in Plaintiff's structure shown in Exhibit 22 there is a felt cushion interposed between the back of the base of the projectile shell and the powder. That is not [188] shown in the patent, is that right? A. That is correct.

Q. Also, I notice that in the structure used by plaintiffs there are two felt washers interposed between the parachute and the flare, is that correct?

A. Yes, sir.

Q. And at the extreme left end instead of employing a closure member 24 like that shown in the

(Testimony of Herbert C. Clauser.)

patent, you use a red lacquer seal, is that correct?

A. That's correct.

* * *

Q Will you explain whether or not the wooden thrust column 21 has any utility in this particular flare?

A. Yes, sir. In order to get a full score of function, if the parachute gets fouled, fails to open, why, you deduct, you will be penalized for failure of the parachute to open after you get it up to zenith and get it lighted, so that is a so-called thrust member that is put in there to prevent the force of expelling that expulsion which occurs when the candle is lighted and throws the parachute out there, it is put in there for the purpose of preventing the paper chute from being crushed, being wadded in there, it is to communicate [189] the thrust of the last expulsion to the top without crushing the parachute, which would make it difficult for the parachute to open.

Q. Then, the thrust isn't taken by the parachute at all, it is taken by the thrust member?

A. That is it exactly.

Q. Then there is a wire connected to the flare and the parachute, is that correct?

A. That's correct.

Q. And it is looped around the felt washer 17?

A. That's correct.

Q. Both the patented structure and Kilgore structure employs a flange at the right end of the eyelet 3, is that correct?

(Testimony of Herbert C. Clauser.)

A. That's correct

Q. And does that flange rest upon the base in the plaintiff's structure? Does it rest upon the base of the projectile shell?

A. If I get your question correctly, there is a washer interposed there, washer between. [190]

* * *

The Court: Is there any issue about it?

It seems perfectly obvious to me, gentlemen, that the felt there is a cushion between the wooden part and the base of the projectile. I assume it performs the function of absorbing shock. Is that what it is for, Doctor?

The Witness: Yes, for shock. It is a combination. It is just a logical thing to put there when you have action like that, for more than one reason. [191]

* * *

Q. Dr. Clauser, is it necessary to limit the projectile case to perform the functions that this particular flare performs? I mean is it necessary to limit the length of the projectile case to what Kilgore's length is?

A. No, sir, it is not necessary. A flare can be made to meet the same functional requirements by making it somewhat shorter, making it somewhat longer, or vice versa

* * *

A. The functional requirement from a burning standpoint is 30 seconds, and the flare case into which the composition is compressed, the powder

(Testimony of Herbert C. Clauser.)

is compressed there at a high pressure for the sake of slowing the rate of burning. In the open it would explode, it would go almost spontaneously. So by the variation of that pressure—that is, the same amount of material in the same case, by increasing the pressure you will get a lesser volume, in other words, instead of having a flare case that is three inches long, you can reduce it, to be specific, as much as three-quarters of an inch, and get enough composition in there of this type which will give you in excess of 20,000 candlepower and it will burn in [195] excess of 30 seconds, and it is obvious that if that flare case is shortened that you can shorten the whole structure.

Q. That is without changing the cylindrical diameter?

A. Without any change to the cylindrical diameter at all. [196]

* * *

The Court: The burning portion of the flare, then, could be more highly compressed by mechanical pressure by thus confining it in a smaller space?

The Witness: Yes; by doing that you burn it more slowly. [198]

* * *

Cross-Examination

By Mr. Miketta:

Q. Dr. Clauser, during your academic training, in addition to the study of chemistry you unquestionably studied physics, did you not?

(Testimony of Herbert C. Clauser.)

A. Yes, sir, I taught physics for two years.

Q. Among the subjects embraced by your study of physics were acceleration, compressibility of fluids, ballistics, probably, the force of gravity, things of that sort, is that correct?

A. Some of those came in. That is not all of them.

Q. Probably in your engineering training, also, you had occasion to study the strength of materials, the yield strength and the ultimate strength, and the elongation of various metals and alloys, is that correct?

A. Some of that, yes, sir.

Q. The fabrication of these metals by machining and drawing, you are familiar with those things, are you not?

A. Oh, yes.

Q. Of course, you specialized in chemistry, and therefore you studied and are thoroughly familiar with black powders and primers and detonators and propellants and oxidation and reduction effects and the burning rates and the volume of gases generated, and things of that sort, are you not? [214]

A. Yes, sir.

* * *

Q. Prior to your association with the plaintiff here you were with the Triumph Explosives Company from 1924 as their chief chemist, apparently, and Triumph made parachute flares during that period of time, did they not?

A. Yes, sir, lots of them

Q. And in view of the fact that you were with the research group at the Army Arsenal at Pica-

(Testimony of Herbert C. Clauser.)

tinny, you are probably familiar with the publications of the government relating to pyrotechnics as used in the war, particularly War I, among them the history of military pyrotechnics of the World War, published in 1920 by the United States Ordnance Department, are you not?

A. Yes, I was associated with the author that wrote that.

* * *

A. I did not have anything to do with the writing of the books. I said I merely was associated with him after he had written them.

Q. You are familiar with the subject matter there [215] discussed? A. Yes.

Q. And we are correct in our knowledge that parachute type flares were shot from pistols like the Very pistol and the Webley-Scott during the first World War, were they not?

A. To a limited extent only. That is where you are referring to the Very pistol, Mr. Miketta, it was used primarily for the shooting of a star, and the use of the 25 millimeter pistol, which was a star pistol, did not come into use until the World War was practically ended. But it is safe to say that probably some of them were used, not to a great extent.

Q. I am not trying to pin you down to a specific date, Doctor Clauser. Let us say that prior to 1926, which is considerably after the war, there had been descriptions made and actually both 25 and 35 millimeter pistols with parachute type

(Testimony of Herbert C. Clauser.)

flares had been made and tested, and whether they had been used during the war or not is immaterial, but they had been in existence and tested in this country, isn't that correct?

A. I would qualify that, if you increase that calibre. I know that came as a development of the experiences that they had with the 25 millimeter.

Q. Prior to 1926 we had parachute type flares shot from pistols? [216]

A. From a 25 millimeter, which is approximately a 10-gauge shell.

Q. And 35 millimeter, which is approximately 1.4 inches?

A. Yes, sir, as early as that, that was a demand that came out of the use of the smaller pistol, because of the fact that they were not able to get sufficient burning time and sufficient candle-power using a gun of that calibre.

Q. Speaking of burning time, certainly prior to 1929, in view of your experience you could compound or mix a pyrotechnic composition, let's call it that, that would burn red and would give a desired brilliance or candlepower, and would have a burning time of either 10 seconds, 30 seconds, or a minute, if you wanted to have it burn that long, isn't that correct?

* * *

A. We could make compositions that burn that time, the various colors, put them in different cases, adapt the composition and the computation of the formula, adapt them to the containers, yes, sir.

(Testimony of Herbert C. Clauser.)

Q. Prior to 1929 you knew that if you took your pyrotechnic composition and you made a very loose pile of it it [217] would have a very high rate of burning and might even explode, isn't that correct?

A. That is correct, sir.

Q. And if you compressed that same composition you could make it burn more slowly, isn't that correct? A. That is correct. [218]

* * *

Q. It wouldn't make a bit of difference whether you hung your candle in the hearth of your photometric set-up in your laboratory, or whether you had it standing here on the table, they would still burn for the same length of time?

A. That is correct. [219]

* * *

Q. I am not trying to trap you; I am just trying to get general statements here. In the pyrotechnic art it is customary to use relatively slow-burning powders to act as propellants, is it not?

A. Propellants, generally speaking, are black powder in some form or another. [220]

* * *

Q. But the effective value of a propellant is varied by the grain size of the powder, is it not?

A. Somewhat, yes, sir.

Q. And it is also varied by the composition of that black powder, because you can vary the composition of a black powder, can you not?

A. Yes, sir, by varying the composition, that is,

(Testimony of Herbert C. Clauser.)

by varying the ingredients that enter into the composition.

Q. And prior to 1929 these variables and these compositions were well known, were they not?

A. Yes, sir, that is right.

Q. Doctor, do you know to what height the Very lights, either the 25 or 35 millimeter and the parachute flares that were fired from the Very and the Webley-Scott pistols—do you know to what height they would go?

A. Do you mean the stars, that is, the star form?

Q. The parachute signals, the parachute flares?

A. Oh, it would depend entirely in what position you hold the gun. If you hold it an angle or hold it vertically.

Q. Let us assume they were held vertically.

A. If you shoot it at a vertical distance, it will go higher than that of a parachute flare.

The Court: That is, higher than 150 feet?

The Witness: Yes, sir, it will. If you shoot merely a star, it has been virtually compressed and made to play the part [221] of a bullet. You are virtually making a bullet out of pyrotechnic composition, and that shot in a 25 millimeter pistol, if it is shot erect, would go higher than the projectile, that is, of a 37 millimeter distress signal with a parachute in it.

The Court: You are referring now when you speak of distress signals to flares such as involved in this case?

(Testimony of Herbert C. Clauser.)

The Witness: That is correct, your [222] Honor.

* * *

Q. The burning time of this particular candle that we are contemplating, let us say we are contemplating a particular candle, the burning time of that candle is not influenced in any way by whether the projectile case from which it was ejected was made of metal or brass or aluminum or, let us say, synthetic plastic or heavy cardboard, is it?

A. That is, the container from which it was ejected has no influence?

Q. That is correct.

A. That is correct. [223]

* * *

The Court: But counsel's question is as to the case in which it is, whether it is an aluminum case or something else, or one-piece or a two-piece case, that does not have anything to do with the burning time?

The Witness: No, sir.

The Court: I think that is pretty obvious. It would be a great burden on the other side to convince me that it did. [225] Let us not take up any more time with that. The witness has described what he views to be the advantageous features of the single-piece projectile shell. [226]

* * *

The Court: I understood the plaintiff's claim was a combination of old elements to produce a better result. Isn't that the essence of plaintiff's claim?

(Testimony of Herbert C. Clauser.)

Mr. Schmieding: Yes. [227]

* * *

The Court: You do not need to argue it. I just want your position. Do you claim that there is anything about this invention that is new except the combination of elements?

Mr. Schmieding: Yes, we do, your Honor.

The Court: What is it?

Mr. Schmieding: We claim there is something new in the shape of this particular eyelet.

The Court: You mean there has never been an eyelet shaped that way before?

Mr. Schmieding: There never has been an eyelet shaped that way before. Eyelets are old. We will admit that eyelets are old.

The Court: And tapered eyelets are old, aren't they?

Mr. Schmieding: Dome-shaped eyelets, but, as Dr. Clauser pointed out, they do not function the same as this tapered eyelet with the elongated restriction.

The Court: But the device itself, an eyelet tapers to a smaller aperture at one end than at the other end, is old, isn't it?

Mr. Schmieding: Not tapered. A dome with a small hole.

The Court: However it does?

Mr. Schmieding: Oh, yes, that is so.

The Court: It is smaller at one end than it is at the [229] other, isn't it? That is all that eyelet is, isn't it?

(Testimony of Herbert C. Clauser.)

Mr. Schmieding: That is right.

The Court: It is old, isn't it?

Mr. Schmieding: That is right. [230]

* * *

Q. (By Mr. Miketta): If instead of a taper, that had been partly rounded, Dr. Clauser, would not the pressure of the gases within the cartridge base acting on that plug or delay fuse composition also be prevented from blowing through the aperture by the fact that you did have a half round or curved surface instead of a tapered surface?

A. My answer to that is no. If they were rounded, you would have to have an opening at the top, an aperture, [234] and the aperture would have to be very, very, very small or just you would not have it rounded. And if you get down to the point of the aperture which you refer to in that other patent there, that cartridge, there is only a real little aperture in through the top, and that is definitely not a fuse. There is a difference.

* * *

The Court: It might not be as desirable?

The Witness: That is right.

The Court: But it would perform the same function, would it not?

The Witness: That is correct, your Honor. That is desirable.

The Court: Just so it cannot be pushed in, just so the fuse cannot be pressured into the compartment of the projectile, is that it?

(Testimony of Herbert C. Clauser.)

The Witness: That is it exactly.

The Court: And your view is that this shape is more efficient and performs the function better than some other shape, is that it? [235]

The Witness: Yes, sir.

Q. (By Mr. Miketta): Does the patent tell you how large a diameter that should be at the small end of the nipple?

* * *

The Court: I will allow the question. This gentleman is an expert in the art. I will allow him to answer whether the patent teaches how much taper there should be of that fuse. Is that your question?

Mr. Miketta: Yes, your Honor, and what the diameter of the opening should be in the small end of the nipple or eyelet in comparison with its largest diameter. Does the patent teach that?

A. It don't teach that, but that has been arrived at, that is, during the process of trial and error that we have found out that.

* * *

A. By experiment we have found out which is an opening which is designed to allow enough spit to come through there to make a sure-fire ignition. That is by practice, by [236] experimentation that we have learned that, and consequently it has been put into use, and, at the same time, get sufficient constriction there to keep the powder from being blown through so as to cause a premature.

The Court: You mean you have learned it by experimentation and practicing the invention—

(Testimony of Herbert C. Clauser.)

The Witness: Yes, sir.

The Court: —since the patent was issued?

The Witness: No, that is before. That is in the early days. That is how those things are arrived at. That is the way we arrive at those things.

Q. (By Mr. Miketta): By "we" you refer to Triumph?

A. Well, I mean today, yes, sir, we have problems like that coming up. That is, those things do not appear—

Q. We are talking about this, Dr. Clauser. Let us stay on one subject, please. When you state that you arrived at this particular shape from your experimentation do you refer to Kilgore's experience or to Triumph's experience?

A. That is my experience.

Q. Your experience? A. Yes, sir.

Q. And you have been with Kilgore only since 1938, is that correct? A. Yes, sir. [237]

The Court: There is nothing in the patent that teaches you dimensions?

The Witness: There is nothing in the patent or in the art.

Q. (By Mr. Miketta): Do you agree with Mr. Hubbard's statement which in general was that the weight and balance of a projectile case influenced the height to which it is projected?

A. The answer is obviously yes.

* * *

Q. And you know that from your own personal experience prior to 1938, is that correct?

(Testimony of Herbert C. Clauser.)

A. I know that ever since I worked with rockets.

The Court: If you didn't know it from experience, you would know it from the laws of physics?

The Witness: That's right.

Q. (By Mr. Miketta): And your general knowledge of science, which you know, would also teach you how large a parachute you needed to support a given weight for a given length of time, is that correct?

A. That can be calculated, yes, sir, reasonably close.

Q. And that knowledge was available to those in the art [238] back in 1929, is that correct?

A. I would say so, yes, sir, if they worked at it faithfully.

* * *

Q. The projectile case during the assembly or manufacture of these signal flares is forced or pressed into the open end of the cartridge, is that correct?

A. That is correct.

Q. There has to be a certain amount of pressure or grip between the walls of that cartridge and the outer surface of the walls of the projectile case, is that correct? [239]

A. That is correct, sir.

Q. Now, if you were to have a very loose fit, then you would not eject your projectile shell or case to the required height, is that correct?

A. That loose fit is avoided by inserting that shell into a die so as to construct that taper bore

(Testimony of Herbert C. Clouser.)

so that you will not have a loose fit. That would be poor ammunition.

Q. So that the taper is a constriction which grasps and holds the projectile? A. Yes.

* * *

Q. (By Mr. Miketta): It is normal, then, that a sufficiently tight fit should exist between the cartridge case and the projectile case or shell, so as to stand water immersion and prevent water from getting in there, isn't that right?

A. Yes. [240]

Q. And you, as a man skilled in this art, would know as of 1929 that you couldn't weld, for example, that cartridge case to the projectile case, isn't that correct? A. That's correct.

Q. And would know, also, that you would just have to give it a sufficiently strong grip or contact to prevent water from getting in and at the same time to generate sufficient pressure in the cartridge chamber beneath the bottom of the projectile shell so as to eject it properly and to the desired height, isn't that right?

A. That is essential, yes, sir.

Q. Also, as a man skilled in the art as of 1929, you would know that you would not want any flame from the black powder used in propelling the projection case come flashing into the end of the projectile case or shell and prematurely igniting the black powder in that area, isn't that correct?

A. No, sir, that is bad stuff.

Q. So you would know that as of 1929, and you

(Testimony of Herbert C. Clauser.)

would therefore make a projectile shell or case which would be substantially gas-tight and prevent any such flame from traveling into the propelling charge, other than through the delay fuse, isn't that correct?

A. That is correct. [241]

* * *

Q. (By Mr. Miketta): Irrespective of what material we are using, Dr. Clauser, if we had a projectile shell in the form of a metallic tube, and you attached a separate bottom on that tube, either by screwing it on or welding it on, as long as you made sure that you had a tight joint between that bottom and the walls of that projectile shell, wouldn't that answer the requirements and prevent flash?

A. It would as long as you get it to the point where you [242] get it absolutely tight.

* * *

Q. And of course it was known in 1929 that you could take and make a tubular member with an integral bottom on it from one piece of metal, was it not?

A. With an integral bottom on it, it was done, but it doesn't have the efficiency, it didn't work as foolproofedly as this item does. [243]

* * *

Q. Will you grant me this, Doctor, that a piece of metal in the form of a tubular member with an integral bottom was known in the military and pyrotechnic arts prior to 1929, generally?

(Testimony of Herbert C. Clauser.)

A. In military for projectiles, shells, yes, sir.

Q. Fine. And they also had a hole in the bottom, didn't they?

A. Yes, I think that is correct.

Q. And they put either firing caps or some other sort of a gimmick in that hole? A. Yes, sir.

Q. And those gimmicks had shoulders that rested against the bottom of the cartridge, is that correct? A. That's correct. [245]

* * *

Q. Dr. Clauser, let us assume for a moment that we have chopped a flare signal shell transversely immediately above the line joining the upper edge of the cartridge shell to the projectile shell, let's just eliminate that part altogether, and now all we are talking about is just the lower or bottom part of the projectile case or shell and the cartridge connected thereto, when that is exploded, when the charge in the cartridge is exploded, the absence of these side walls on the projectile case will not in any way vary or change the operation of your eyelet and delay fuse, will they?

* * *

A. The action of the fuse, do you mean, or the flare?

Q. The projectile case, we eliminate those walls of the projectile case, now the elimination of those walls will not change the function or operation of this eyelet, will it? [246] A. No.

Q. Now, those skilled in the art as of 1924 or

(Testimony of Herbert C. Clauser.)

'29 knew how to select a powder and how to determine how thick the walls of a cartridge should be to withstand the force of that powder, did they not?

A. Yes, sir. [247]

* * *

Recross-Examination

By Mr. Miketta:

Q. You referred to the patent in suit, Dr. Clauser. Fig. 1 of that patent does not show a complete signal flare, does it?

A. No, sir; Fig. 1 does not show a complete signal flare. That is correct.

Q. And the patent shows both muzzle loading and breech-loading flares? A. Yes, sir.

Q. Fig. 2 shows some sort of a star shell, is that correct? A. Yes, sir.

Q. Fig. 3 shows a hand shell, is that correct?

A. Yes, that is correct, but it can be used both ways. It can be used as a hand shell and it can be inserted, it can be inserted into a cartridge [252] base.

* * *

Mr. Miketta: I would like, if your Honor will permit me, to introduce this enlarged photostat just for the purposes of comparison, as the defendant's next in order, Exhibit K—mark it "K-1" [258] please, because I have another photostat for the same purpose.

The Court: Is there objection?

Mr. Schmieding: No objection, your Honor.

The Court: It will be received. [259]

* * *

Mr. Miketta: And of course we have Exhibit F-3, a patent which was not considered by the Patent Office here, and which has [263] Figure 1—Figure 1 being the enlarged view appearing on this tablet or folded sheet, which I would like to make of record as Defendants' Exhibit K-2.

* * *

The Court: Received in evidence. [264]

* * *

HERBERT C. CLAUSER

previously sworn.

Direct Examination

By Mr. Schmieding:

Q. Did Kilgore Manufacturing Company ever manufacture a flare such as depicted by Plaintiff's Exhibit F-18? That is Driggs patent No. 1,776,755.

A. Yes. [303]

* * *

The Court: Is this projectile case made of cardboard, fibre of some kind?

The Witness: The flare case is made out of cardboard, the projectile case is made out of aluminum, sir. [304]

* * *

(Testimony of Herbert C. Clauser.)

Cross-Examination

By Mr. Miketta:

Q. In Exhibit F-18, that is the Driggs and Faber patent, 1,776,755, I call your attention to page 2, lines 11 to 12; when they talk about a fuse, quote, "has burnt a suitable time to permit the projectile to be well clear of [306] the aircraft or firing platform," what did they mean by "firing platform"? Does that preclude the use of this shell from being fired from the ground, or from a firing platform as in your tests?

Mr. Hann: The witness stated that it might be fired from the ground, in his answer.

Mr. Miketta: He did so state?

Mr. Hann: Yes, he did so state.

* * *

Q. (By Mr. Miketta): In the patent in suit, Dr. Clauser, 1,947,834, on page 2, lines 18 and 19, it is stated,

"The principal use of the cartridge with its flare and parachute is as shown in Figure 4"—

Have you found that?

* * *

Now, if you look at Figure 4, that is a cartridge for a breech loading gun, is that correct?

A. Figure 4 as it is depicted here?

Q. Yes. [307]

* * *

(Testimony of Herbert C. Clauser.)

A. No, sir.

Q. That is for a muzzle loading?

A. That is for a muzzle loading gun, unless—I want to qualify that, Mr. Miketta.

Q. Pardon me.

A. The Army has a gun by which they load both this annular groove shell and the flange shell as breech load shells.

Q. As of 1930 and 1931 did they have such a gun?

A. No, sir, they didn't have a gun to fire both shells.

* * *

Q. And therefore, Figure 4 really relates to a muzzle loading shell which is of the type which you say was used from aircraft?

A. Yes, sir, that's definitely an aerial [308] shell.

* * *

The Court: What is the combination here, Mr. Schmieding?

* * *

The Court: That is covered by this patent?

Mr. Schmieding: It is the combination, for example, as expressed in claim 3, of a fuse, which is used in combination with a one-piece projectile case. [315]

* * *

The Court: So the novelty part of this invention is the use of a projectile case made of one piece?

Mr. Schmieding: That's right, your [317] Honor.

* * *

The Court: The same in 9, 10, and 11. There is a qualification inherent in the description of the combination. If a one-piece shell was known to the prior art, the tubular eyelet was known to the prior art, a shoulder on the eyelet resting on the outside of the base of the shell, what is the invention here?

Mr. Schmieding: The claim, in my opinion, should be interpreted narrowly in view of the drawings, and I believe they should be read that "in combination a projectile shell including." [322]

* * *

The Court: Well, had not that combination been used in the earlier Driggs and Faber patents, with the exception of the integral wall shell?

Mr. Schmieding: Yes, that is true. [324]

* * *

Mr. Schmieding: Your Honor, in this particular combination flares are old, parachutes are old, wooden blocks are old, but all of those when they were assembled did not function the way they should have functioned. It took—

The Court: That may be true, but if the combination was disclosed in the prior art there is no invention, the [326] precise combination, although your application of it may have produced a better result.

What I am getting at is this, what is there that is new in this combination that, for example,

Driggs and Faber hadn't previously disclosed in combination in their prior patent?

Mr. Schmieding: The one-piece shell that embodied these elements that took this prior art that didn't operate satisfactorily and made it a satisfactory apparatus.

The Court: So everything that is described in the patent in suit in combination has been previously claimed in combination, has it not, by these same inventors——

Mr. Schmieding: Except the one-piece shell.

The Court: —in prior art, except that now they say we combine all these things with a one-piece shell?

Mr. Schmieding: That's right, your [327] Honor.

* * *

The Court: The combination has been the same, except that the shell has been in more than one piece?

Mr. Schmieding: That's right. [328]

* * *

The Court: What is the difference between claims 7, 8, 9, 10 and 11?

Mr. Schmieding: Claim 8 distinguishes from claim 7 only in the last three lines, which specifies, "and means on said base of the cartridge case for positioning said shell and case in a fire implement."

Claim 10 distinguishes from claim 9 only in lines 56 and 57, which include

"and means to prevent the collapse of said parachute."

And claim 11 distinguishes from claim 10 only in the last three lines, which includes the words,

"and detachable closure means for said shell engaging said means for preventing the collapse of the parachute." [329]

Claim 9 brings in the fact that the side walls are relatively thin material while the base is relatively heavy.

That seems to be somewhat different than the other claims in the case. [330]

* * *

The Court: Now, if you claim nothing but the projectile shell, you have a combination which does not produce any different or better result than the prior art produced, do you not?

Mr. Schmieding: Without the cartridge case?

The Court: Yes.

Mr. Schmieding: That is true, your [339] Honor.

* * *

The Court: As a matter of fact it is claimed where the prior art knew better flares of the same combination for these purposes, isn't it?

Mr. Schmieding: That is true. [341]

* * *

The Court: If there is any invention here at all, it seems to me, in view of the prior art, it has to be a very narrow combination, very narrow in scope. I am not saying it must be so narrow that

there is no room for any equivalent; I am not suggesting that it must be so narrow as to be limited to the precise device disclosed in the patent.

Mr. Schmieding: It is in a crowded art.

The Court: But as I understand the patent, it is not upon the idea of the invention, but upon the application of the idea, and unless you can apply the idea with the combination, unless it is a complete combination, where invention is claimed because of an improved result arising from a combination, unless it is a complete combination must it not be said that either it doesn't function, or (2) that it is void for want of invention because it does not operate to achieve the improved result? [347]

* * *

At the present time my view is that if there are any claims in this patent that can be sustained at all, it would have to lie in claims 7, 8, 9, 10, or 11.

Mr. Schmieding: I was going to call your Honor's attention to that, that that does define the combination with the cartridge case and one-piece shell. [348]

* * *

Friday, November 3, 1950—9:30 A.M.

* * *

Mr. Schmieding: We desire to limit the issue as to the claims in the present case.

We feel that claims 8 and 11 define the invention in its narrowest aspects. [350]

. * * *

Mr. Schmieding: Claim 9 is exactly like claim

10 except that it does not include the means to prevent the collapse of the parachute.

The Court: It is not exactly alike, is it? The opening clause is "In combination, a cartridge case constituting a gun barrel."

Mr. Schmieding: That is right. I failed to notice that.

* * *

The Court: That is a muzzle-loading arrangement, Fig. 4.

Mr. Schmieding: That is a muzzle-loading arrangement. [352]

* * *

The Court: He probably needed to make it the same length. Now, laying aside patent infringement, he wants to copy the plaintiff's device.

Mr. Schmieding: That is right, and he did.

The Court: He may do that in size in order to meet the Coast Guard specifications, may he not, laying aside any question of patent infringement?

Mr. Schmieding: Oh, yes, yes.

The Court: He would have to make it out of aluminum, would he not, for it to be successful commercially?

Mr. Schmieding: I don't know of any substitute material that could be used. [359]

* * *

The Court: As I have said, gentlemen, during the course of oral argument, this case is not free from doubt on the issue of validity, which turns upon the issue of whether the new combination, what was done by the inventors, rises to the dig-

nity of invention. It seems clear to me that the inventors have devised something new and useful in this relatively crowded but apparently a slowly developing field. They have produced a new combination of old elements which together produce a better result than anything previously known to the art.

I find that the combination is not only new and useful, but it embodies invention. I am unable to distinguish this situation here from the Ray-O-Vac case in 321 U. S. Reports.

As to the claims 7, 8, 9, 10, and 11 of the United States Letter Patent 1,947,834 I find the combinations there described are new and useful and embody invention, and that those claims are valid and infringed by the accused device here, Plaintiff's Exhibit 2.

As to the other claims in issue, claims 1, 2, 3, 4, and 5, I find them invalid for want of invention, the combination there described not being a combination which would produce the new and improved result achieved by the combination described in claims 7, 8, 9, 10, and 11.

Specifically, I hold claims 1, 2, 3, 4, and 5 invalid for want of invention because not limited to a projectile shell in combination with a cartridge [401] case.

Accordingly, interlocutory findings of fact and conclusions of law are ordered in favor of the plaintiff and against the defendants, which will enjoin the defendants from further infringement of claims 7, 8, 9, 10 or 11 of the patent in suit, and

which will award plaintiff a judgment against the defendants for all damages which plaintiff may have sustained as a proximate result of the infringement of claims 7, 8, 9, 10, and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

I further find that the plaintiff is entitled to an accounting from the defendants Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid the determination of the issue of plaintiff's damages resulting from the infringement by defendants of claims 7, 8, 9, 10, and 11 of the patent in suit, accordingly the cause will be referred to Howard V. Calverley as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, with directions to hear the accounting as to profits derived by the defendants from the infringement of the claims 7, 8, 9, 10, and 11 of the patent in suit, and to hear all other relevant evidence on the issue of plaintiff's damages to be assessed pursuant to Section 4921 of the Revised Statutes as Amended, 35 U. S. [402] Code 70, and to report his findings of fact and conclusions of law with respect to assessment of damages arising from the infringement of the patent in suit.

I further find that the infringement was conscious, deliberate, and wilful, but decision on plaintiff's prayer for increased damages and for attorney's fees will be reserved until after determina-

tion of the issue as to plaintiff's damages. Plaintiff will recover costs of the defendants, to be taxed by the clerk, but the determination of the costs will await the determination of the issue of plaintiff's damages. [403]

* * *

Mr. Miketta: May the court please, in view of the fact that this case probably will be appealed, I should like to have your Honor's expression as to the validity of the remaining claims of this patent. [404]

* * *

The Court: Does claim 9 not claim a one-piece shell?

Mr. Schmieding: I do not see the words "one-piece shell" or "integral" in that.

The Court: Very well, the claim 9 will be held invalid for the same reasons as claims 1, 2, 3, 4, and 5 are held invalid, and the judgment heretofore indicated is modified accordingly.

Mr. Miketta: Now, may the court please, claims 10 and 11, and in original claims 12, 13, 14, and 15 that they charge us with infringement, claims 10, 11, 12, 13, 14 all include [406] an annular groove in the base of the cartridge case which we certainly do not use.

The Court: Yes, I know that, but is that anything more than a mere detail? [407]

* * *

The Court: Is there any contention they would function any differently?

Mr. Miketta: Yes, your Honor.

The Court: How?

Mr. Miketta: You cannot use that annular groove in the Coast Guard pistol, for instance.

The Court: But you might in some other pistol, might you not?

Mr. Miketta: That is correct. And then we are smack into the prior art again and the claims read on the prior art as far as that element is concerned. And if the stick is necessary in order to keep that parachute from collapsing, I want to call your Honor's attention to the fact that claims 7 and 8 do not include that stick, if that prevent the collapse of the parachute. [408]

* * *

The Court: What is the plaintiff's view of the importance of the means to prevent collapse of the parachute?

Mr. Schmieding: The entire apparatus would function whether that stick was in there or not. The stick adds to the function, that is true, but the projectile would go into the air to the same extent, the flare and the parachute would be ejected from the projectile shell after it reached the pre-determined height. [409]

The Court: Does plaintiff insist that this result can be achieved without the protection of the parachute?

Mr. Schmieding: Yes, your Honor.

The Court: Why is it used, then?

Mr. Schmieding: We obtain better results with the use of the stick. The stick insures that the

parachute will not collapse or be injured by the ejection.

The Court: I will hold claims 7 and 8 valid, but not infringed, because of the presence in the defendants' accused device of the means to prevent the collapse of the parachute and the absence of that feature as a part of the combination [410] claimed.

* * *

Mr. Schmieding: We will stand on the record that claims 6, 12 to 23, are not infringed.

* * *

The Court: What about this protection for the parachute? That is the one that disturbs me, the omission of that from paragraphs 7 and 8. I am not concerned about gas checks or closures at the end.

Mr. Schmieding: In that respect, your Honor, the defendant has not produced any evidence whatsoever that it will not work.

The Court: But the plaintiff has produced evidence that that is one of the salient features, hasn't it? [412]

Mr. Miketta: Precisely, your Honor. Dr. Clauser stated it would wad up, foul, and wouldn't be workable without that stick.

Mr. Schmieding: I don't believe Dr. Clauser testified that strongly.

The Court: Gentlemen, you have a transcript. Do you want to come back Tuesday, and we will take this up some more?

My recollection is that Dr. Clauser did testify that was a very important contribution, very important element. I may be in error. You have a transcript, and we don't have to resort to guesswork.

Mr. Schmieding: I agree with that, but the only point I am making is that it will work at times without that stick in position.

The Court: Then how can I hold the combinations embraced within claims 7 and 8 valid? Don't they fall in the same category as 1, 2, 3, 4, and 5, as lacking one of the essential elements to achieve this result?

Mr. Schmieding: They achieve a result, that's true—

The Court: And shouldn't I hold, then, 7 and 8 invalid for the same reasons—it is only a difference of degree—as the reasons for which I have held claims 1, 2, 3, 4, and 5 invalid?

Mr. Schmieding: I think you should. [413]

The Court: Well, that will be the holding. Vacating the order that claims 7 and 8 are valid, but not infringed, the court will hold that claims 7 and 8 are invalid as not embracing the complete combination necessary to achieve the result, and, hence, void for want of invention. [414]

* * *

The Court: Let's take up claim 6 first.

Mr. Schmieding: That, your Honor, reads specifically on Figure 3 of the patent.

The Court: Do you claim it is valid?

Mr. Schmieding: No.

The Court: You don't claim it is valid?

Mr. Schmieding: No, I don't claim it is valid.

The Court: The court will declare claim 6 invalid. Claim 12 omits—

Mr. Miketta: Omits the stick.

The Court: It is invalid. Go to the next one.

Mr. Miketta: Claim 13 is limited to the annular groove.

The Court: Claim 12 omits—

Mr. Miketta: The stick that holds the parachute up. [415]

The Court: All right. It is invalid for the same reasons as claims 7 and 8. I so declare it.

Mr. Miketta: Claim 13 is limited to the annular groove and includes a firing implement having means for detachably attaching the cartridge case therein. It is our contention, your Honor, that that claim is invalid because it includes the firing implement, or if that is a necessary element, then all of the other claims are invalid.

The Court: What do you say to that?

Mr. Schmieding: All what other claims? We will admit for simplicity that claims 12 to 23 are invalid, if that will clear up this matter.

The Court: The court will make the declaration to that effect, then. [416]

* * *

Monday, January 8, 1951, 2:00 P.M.

* * *

The Court: The Driggs patent 1,776,755, Exhibit F-18, of the prior art, issued on September 23, 1930, expired in 1947.

Mr. Schmieding: That is right, your Honor.

The Court: If anyone used that device would he infringe the patent in suit?

Mr. Schmieding: No, he would not.

* * *

The Court: Well, it would have a little different shape. Would the contents of the interior be arranged about the same?

Mr. Schmieding: The contents of the interior would be [2*] arranged substantially the same; that is true.

The Court: And the difference would be that one projectile case is in two parts and the other one is in one part.

Mr. Schmieding: That is right, your Honor.

The Court: And that would be the only difference?

Mr. Schmieding: No. I would not—

The Court: As far as difference between the two patents is concerned.

Mr. Schmieding: No. There is this difference also, if you will take notice, in the patent in suit we have a charge of powder—I will use the Exhibit 25 as an example.

The Court: I have a cross-section of it. Well, I have the drawings here.

Mr. Schmieding: We have an expelling charge interposed between the end of the projectile case and the interior cartridge case, that is, there is black powder inside of that chamber, whereas in

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the expired patent there is no powder in the chamber A.

The Court: The chamber A?

Mr. Schmieding: In the expired patent, that is true.

The Court: Chamber A, is that in issue? Oh, yes. What expels the flare?

Mr. Schmieding: Well, I imagine merely a blank cartridge.

The Court: To expel the flare? [3]

Mr. Schmieding: That is right.

The Court: Of the projectile case.

Mr. Schmieding: That is correct.

The Court: How high would that expel it?

Mr. Schmieding: A very short distance; and that is one of the differences between this present invention and their earlier patent.

The Court: What has been done is this, isn't it: That the reason powder was not used in the expired patent was because the projectile case would not stand that pressure, would it?

Mr. Schmieding: That is right, your Honor, if you wanted to project it at the height that was desirable.

The Court: But under the expired patent could you project the projectile case to a high altitude?

Mr. Schmieding: No, you could not. I would like to—

The Court: But if you put powder in there, it would be expelled to a higher altitude, would it not, the projectile?

Mr. Schmieding: It would be expelled to a

higher altitude, but that is not the only problem you have. You have to hold a gun and you cannot put sufficient powder in there to expel that to such a height. The recoil would be such that one could not hold it. If you take notice, this gun is substantially large in itself. Now, you can only withstand a certain amount of recoil. If you built that projectile case [4] strong enough, if you built it out of two pieces so it would have such a weight that to raise it at the height desirable, you could not withstand the recoil.

This is placed, as you recall, in lifeboats and used merely as a distress signal. As Dr. Clauser testified, apparatus made in accordance with that expired patent was never used for projecting a projectile any substantial distance, and the patent so states.

The Court: I understand that. I recall that. But what is the claimed invention here is merely making a one-piece projectile case.

Mr. Schmieding: That is right, your Honor.

The Court: That is my problem. As a practical matter no one could build a flare, even using the precise device of the expired patent, if he put it in the single piece; he would be infringing the patent in suit.

Mr. Schmieding: That is right.

The Court: According to plaintiff's contentions here.

Mr. Schmieding: That is right, your Honor. It is that idea that they finally conceived after building the flares that were shot out of airplanes. This is an airplane type shell. There is no intention to

lift it up in the air. You are shooting it out of the airplane in this expired patent and it merely floats to the ground. You just merely use enough expelling charge to get it away from the airplane. You are not interested in expelling it very high into the [5] air.

The Court: Where is there invention in deciding that a one-piece shell will withstand more pressure than a two-piece device? As far as the powder is concerned, that is just merely a method of operation, isn't it?

Mr. Schmieding: Yes.

The Court: You would not claim any invention after putting powder in there in order to discharge the projectile at a greater height?

Mr. Schmieding: No. [6]

* * *

The Court: So what troubles me here, while we can talk about a combination and limiting a device to the precise combination taught in the patent, when we analyze it we are saying that making two pieces of one is an invention.

Mr. Schmieding: That is right. That is right, your Honor. [7]

* * *

The Court: How would you distinguish that from the Stewart Warner case the Alemite cases, the grease gun cases?

* * *

The Court: He claimed more than he invented, and that is the problem here, isn't it, whether this

inventor did not claim more than he invented? He claims nothing more than putting two pieces into one piece, and the combination existed in the expired patent, Exhibit F-18, did it not?

Mr. Schmieding: Yes.

The Court: And every part of it performs the same function it performs; that is, in both devices the only [8] difference is the expelling charge can be greater because the projectile case is one piece instead of two.

Mr. Schmieding: That is right.

* * *

[Endorsed]: Filed Jan. 22, 1951. [9]

DEFENDANTS' EXHIBIT G

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TR 0371,
Attorney for Defendants.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a Corporation, and CHARLES SCHNEIDER, d.b.a. SIGNAL MANUFACTURING COMPANY,

Defendants.

ADMISSIONS MADE BY PLAINTIFF IN RESPONSE TO DEFENDANT'S REQUESTS AND INTERROGATORIES

A. "1. That Louis L. Driggs, Jr., one of the alleged inventors of patent No. 1,947,834 in suit herein, testified under oath in the case of The Kilgore Mfg. Co., et al., v. Triumph Explosives, Inc., et al., in which case patent No. 1,947,834 was in issue, as follows:

"The Court: There is nothing new, is there, in the arrangement of the contents of the

Defendants' Exhibit G—(Continued)

projectile? That is to say, this method of arranging the powder and connecting fuses and protecting certain parts by the felt washer and including a parachute and all that, is there anything new in that?

“ ‘The Witness: Not in the projectile itself, no, basically.’

* * *

“ ‘Q. Mr. Driggs, continuing for a moment the line of his Honor’s examination, I understood you to say it is not your position that there is anything new in the arrangement of the contents of the projectile, is that correct?

“ ‘A. We make no such claim.

“ ‘Q. Is it your contention that there is anything new in the arrangement or in the combination of a projectile containing those particular contents, with a cartridge case containing a propelling charge for such a projectile, being adapted to be projected from the cartridge case when the propelling charge is exploded? A. No.

Note: Prefix “A” indicates matter is from First Request.

Prefix “B” indicates matter is from Second Request.

Prefix “C” indicates matter is from Third Request.

Prefix “D” indicates matter is from Interrogatories.

Defendants' Exhibit G—(Continued)

“Q. That combination is admittedly old, I take it?

“A. Well, it is exemplified by the old Very pistol ammunition which is a cartridge case projectile.”

(Record, pages 151 and 153.)”

(Answer.) “Plaintiff admits that Louis L. Driggs, Jr., testified as quoted in paragraph 1 of Defendants' Requests for Admissions * * *”

A. “2. That during the trial of this cause plaintiff will not contradict nor depart from the testimony quoted in the above request.”

(Answer.) “Plaintiff will not contradict nor depart from the testimony quoted in request No. 1 * * *.”

A. “9. That plaintiff will not claim novelty, during the trial of this case, in * * *

* * *

“(d) —in the arrangement or combination of a projectile containing a parachute candle or flare, protecting washers, expelling charge, and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap.”

(Answer.) “Plaintiff * * * admits the allegation in item (d).”

D. “6. State whether plaintiff will, during the trial of this cause, claim novelty in * * *

* * *

Defendants' Exhibit G—(Continued)

“(d) —in the arrangement and combination of a projectile containing a parachute candle or flare, protecting washers, expelling charge, and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap.”

(Answer.) “* * * Plaintiff will not, during the trial of this cause, claim novelty in the arrangement of the contents of the projectile as described in ‘(d)’ of Defendant’s interrogatory 6.”

B. “13. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in printed publications and known to others—

“(a)—parachute type flares including a projectile case, an annular, wooden disc partially surrounding the expulsion charge near one end of such case, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare;

“(b) —a pyrotechnic device including a projectile case, an ejection charge in the lower end of such case, a flare or candle and a layer of partitioning material between such flare or candle and other elements in the forward or upper end of the projectile case.”

(Answer.) “(a) Plaintiff admits that prior to the earliest date of invention by Driggs and Faber,

Defendants' Exhibit G—(Continued)

there was described in printed publications and known to others a parachute type flare including a projectile shell, an annular, wooden disc partially surrounding the expulsion charge near one end of the shell, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare.

“(b) Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others a pyrotechnic device including a projectile shell, and ejection charge in the shell, a flare or candle and a layer of partitioning material between such flare or candle and other elements in the forward or upper end of the projectile shell.”

A. “13. That prior to the earliest date of invention for the subject matter of claims 1 to 11 and 15 and 16, upon which plaintiff will rely during the trial of this case, there was known to others in the United States the Webley-Scott pistol adapted to receive a flare cartridge by breach loading and adapted to expel such flare cartridge having a short cartridge case.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 13 of Defendants' Request.”

A. “3. That Louis L. Driggs, Jr., one of the alleged inventors of patent No. 1,947,834 in suit herein, testified under oath in the case of the Kilgore Manufacturing Company, et al., v. Triumph Explosives, Inc., et al., as follows:

“Q. By the way, Mr. Driggs, what type

Defendants' Exhibit G—(Continued)
of cartridge was used in the Webley-Scott pistol, if you know?

“ ‘A. A cartridge about 3½, 3¾ inches long, and containing a pyrotechnic star.

“ ‘Q. Is that the only cartridge which was used in the Webley-Scott pistol, to your knowledge?

“ ‘A. That is one form. And then there was another form in which the cartridge case was quite short, that is, approximately 3¾ inches long, and in which a projectile case extended out of that cartridge case, and the projectile case had different types of pyrotechnics within it.’

(Record, pages 217-218).”

(Answer.) “Plaintiff admits that Louis L. Driggs, Jr., testified as quoted in paragraph 3 of Defendants' Request for Admissions in the case of the Kilgore Manufacturing Company, et al., v. Triumph Explosives, Inc., et al.”

A. “4. That during the trial of this cause plaintiff will not contradict nor depart from the testimony quoted in the above request No. 3.”

(Answer.) “Plaintiff during the trial of this cause will not contradict nor depart from the testimony quoted in paragraph 3 of Defendants' Request for Admissions * * *.”

A. “10. That during the first World War the A.E.F. extensively used a Very hand gun or projector and signals to be fired from such gun.”

Defendants' Exhibit G—(Continued)

(Answer.) "Plaintiff admits the subject matter of paragraph 10 of Defendants' Request."

A. "11. That the Very hand gun and projector was a short-barreled, single-barreled gun of the breech loading type adapted to receive a flare cartridge by insertion through the breech end of the barrel."

(Answer.) "Plaintiff admits the allegation in paragraph 11 of Defendants' Request for Admissions."

A. "12. That the flare cartridge used in the Very hand gun and projector resembled an ordinary shot gun cartridge in form but not size."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 12 of Defendants' Request."

A. "13. That prior to the earliest date of invention for the subject matter of claims 1 to 11 and 15 and 16, upon which plaintiff will rely during the trial of this case, there was known to others in the United States the Webley-Scott pistol adapted to receive a flare cartridge by breech loading and adapted to expel such flare cartridge having a short cartridge case."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 13 of Defendants' Request."

A. "14. That all signal flares including the signal flares employed in the Very and Webley-Scott pistols prior to the earliest date of invention of the subject matter of the patent in suit on which plain-

Defendants' Exhibit G—(Continued)

tiff will rely during the trial of this case included—

- “(a) ——A cylindrical cartridge case;
- “(b) ——a cylindrical projectile.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 14 of Defendants' Request.”

A. “8. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was known to others in the United States—

“(a) ——fixed or self-contained ammunition including a cartridge case and a projectile, the cartridge case acting as an auxiliary barrel from which the projectile was expelled in use;

“(b) ——fixed or self-contained signal flare ammunition including a cartridge case and a projectile to be fired from a pistol or firearm;

“(c) ——fixed or self-contained signal flare ammunition including a short cartridge case and a relatively long projectile;

“(d) ——fixed or self-contained signal flare ammunition including a relatively short cartridge case of circular cross-section and provided with an outwardly extended flange at the base thereof and a cylindrical, relatively long projectile extending from such cartridge case.”

(Answer.) “Plaintiff admits that there was known to others in United States the elements defined in (a), (b), (c) and (d) in Defendants' Request for Admissions * * *”

Defendants' Exhibit G—(Continued)

A. "6. That more than two years prior to September 19, 1931, there was publicly used and sold in the United States—

"(a) —a tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom;

"(b) —the tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom, the eyelet having a reduced inner end and a fuse powder in the eyelet."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 6 of Defendants' Request for Admissions."

A. "7. That more than two years prior to September 19, 1931, there was known to others in the United States:

"(a) —a tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom;

"(b) —the tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom,

Defendants' Exhibit G—(Continued)

the eyelet having a reduced inner end and a fuse powder in the eyelet."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 7 of Defendants' Request for Admissions."

B. "4. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in a printed publication and known to others in the United States—

"(a) —a case or shell having a base and side walls of one piece of metal, the base having an aperture therein;"

(Answer.) "Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others in United States

"(a) —a cartridge case having a base and side walls of one piece of metal, the base having an aperture therein."

B. "5. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in printed publications and known to others in the United States—

"(a) —a shell or case having substantially cylindrical side walls and a base integral therewith;

Defendants' Exhibit G—(Continued)

“(b) —a shell or case having a base and substantially cylindrical side walls, of one piece of metal;

“(c) —a shell or case having a relatively thick base and integral side walls, the side walls being thinner than the base, the shell being made of metal;

“(d) —a shell or case having a base and substantially cylindrical side walls of one piece of metal, the base being provided with an aperture.”

(Answer.) “Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others in United States—

“(a) —a cartridge case having substantially cylindrical side walls and a base integral therewith,

* * *

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States—

“(b) —a cartridge case having a base and substantially cylindrical side walls, of one piece of metal,

* * *

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was

Defendants' Exhibit G—(Continued)
described in printed publications and known to
others in the United States—

“(c) —a cartridge case having a relatively
thick base and integral side walls, the side walls
being thinner than the base, the cartridge case
being made of metal,

* * *

“Plaintiff admits that prior to the earliest date
of invention by Driggs and Faber, that there was
described in printed publications and known to
others in the United States—

“(d) —a projectile case having a base and
substantially cylindrical side walls, of one piece
of metal, the base being provided with an aper-
ture,”

* * *

A. “5. That Louis L. Driggs, Jr., and Henry
B. Faber were not the first—

“(a) —to provide an aluminum cartridge
case;

“(b) —to provide an extruded aluminum
cartridge case.”

(Answer.) “Plaintiff admits the allegations set
forth in paragraph 5 of Defendants' Request.”

C. “7. That the manufacture of cartridge cases
having side walls and a base, from one piece of
aluminum, was known to others in the United
States prior to the earliest date of invention by
Driggs and Faber of that which is described and
claimed in claims 1 to 11 and 15 and 16 of the
patent in suit.”

Defendants' Exhibit G—(Continued)

(Answer.) "Plaintiff * * * admits that the patent No. 1,114,228 shows a part of a cartridge case having cylindrical side walls and base formed of one piece of aluminum, * * *."

B. "10. That the manufacture of a case or shell by drawing metal to form a case or shell having side walls and a base integral therewith was known to others in the United States prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit. (Attention is directed to U. S. patents No. 132,227 and No. 208,407.)

(Answer.) "Plaintiff admits that the manufacture of a cartridge case by drawing metal to form a case having side walls and a base integral therewith was known to others in United States prior to the earliest date of invention by Driggs and Faber, * * *."

B. "11. That patent No. 79,963 issued in 1868 relates to a parachute type signal."

(Answer.) "Plaintiff admits the allegations contained in paragraph 11 of Defendants' Second Request for Admissions."

C. "3. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in patent No. 116,094 issued June 20, 1871, the following:

"(a) —a hollow, cylindrical, one-piece metallic case or shell having a base and side walls of one piece of metal, the base having

Defendants' Exhibit G—(Continued)

an aperture therein, and an eyelet or small cup positioned in the aperture, the eyelet or cup having an outwardly extending flange or shoulder at one end, the flange or shoulder resting on the outside of the base."

(Answer.) "3. Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in patent No. 116,094—

"(a) —a hollow, cylindrical, one-piece metallic cartridge case having a base and side walls of one piece of metal, the base having an aperture therein, and a small cup positioned in the aperture, the cup having an outwardly extending flange or shoulder at one end, the flange or shoulder resting on the outside of the base,"

* * *

C. "4. That patent No. 116,094 shows a device including the following elements:

"(a) —a cylindrical hollow shell;

"(b) —a base for such shell, said base being integral with the side walls of the hollow shell;

"(c) —an aperture in such base;

"(d) —an eyelet or small cup extending through said aperture, said eyelet having a flange or shoulder at its lower end, said flange or shoulder being in contact with the lower surface of the base, said eyelet or cup having a reduced inner end."

Defendants' Exhibit G—(Continued)

(Answer.) "4. Plaintiff admits that patent No. 116,094 shows a device including the following elements:

"(a) —a cylindrical hollow cartridge case;

"(b) —a base for such case, said base being integral with the side walls of the hollow case;

"(c) —an aperture in such base;

"(d) —a small cup extending through said aperture, said cup having a flange or shoulder on its lower end, said flange or shoulder being in contact with the lower surface of the base,"

* * *

B. "8. That a pyrotechnic signal device having a relatively short case or cartridge shell and a longer projectile case is shown in—

"(a) —United States Patent No. 216,552 issued to Bogardus in 1879;

"(b) —United States Patent No. 987,590 issued to Murphy in 1911";

* * *

(Answer.) "(a) Plaintiff * * * admits that the patent to Bogardus No. 216,552 shows a projectile signal device having a relatively short cartridge case and a longer projectile shell;

"(b) Plaintiff * * * admits that the patent to Murphy No. 987,590 shows ammunition having a

Defendants' Exhibit G—(Continued)
relatively short cartridge case and a longer projectile shell";

* * *

C. "5. That patent No. 1,114,228 issued October 20, 1914, shows a device including the following elements:

"(a) —a cylindrical hollow metallic shell;

"(b) —a base for such shell, said base being integral with the side walls of the hollow shell."

(Answer.) "5. Plaintiff admits that patent No. 1,114,228 shows a device including the following elements:

"(a) —a cylindrical, hollow, metallic case;

"(b) —a base for such case, said base being integral with the side walls of the hollow shell,"

* * *

C. "8. That a pyrotechnic signal device having a relatively short case or cartridge shell and a longer projectile case or shell is shown in patent No. 1,602,601 issued October 12, 1926."

(Answer.) "8. Plaintiff admits that patent No. 1,602,601 shows a signal device having a relatively short cartridge case and a longer projectile shell * * *."

C. "9. That United States Letters Patent No. 1,602,601 relates to a parachute-type signal flare including a hollow, cylindrical projectile case and a cartridge case or shell having a base and side

Defendants' Exhibit G—(Continued)

walls of one piece of metal, the projectile case being appreciably longer than the cartridge case or shell."

(Answer.) "9. Plaintiff admits that patent No. 1,602,601 relates to a parachute-type signal flare including a hollow, cylindrical projectile shell and a cartridge case, said cartridge case having a base and side walls of one piece of metal, the projectile shell being appreciably longer than the cartridge case, * * *."

C. "10. That United States Letters Patent No. 1,602,601 shows a signal flare of the parachute type, said signal flare including as one of its components a hollow, cylindrical, metallic element having side walls and a base of one piece of metal, the base having an aperture therein."

(Answer.) "10. Plaintiff admits that patent No. 1,602,601 shows a signal flare of the parachute type, said signal flare including a cartridge case having hollow, cylindrical, metallic side walls and a base of one piece of metal, said base having an aperture therein, * * *."

A. "21. That patent No. 1,785,770 shows the combination of:

- “(a) —a cylindrical hollow shell;
- “(b) —a base for such shell;
- “(c) —an aperture in such base;
- “(d) —a tubular eyelet extending through said aperture;
- “(e) —said eyelet having a flange or shoulder at its lower end;

Defendants' Exhibit G—(Continued)

“(f) ——said flange or shoulder being in contact with the lower surface of the base.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 21 of Defendants' Request.”

A. “22. That patent No. 1,785,770 shows a device including each of the following elements:

“(a) ——a cylindrical hollow shell;
“(b) ——a base for such shell;
“(c) ——an aperture in such base;
“(d) ——a tubular eyelet extending through said aperture, said eyelet having a flange or shoulder at its lower end, said flange or shoulder being in contact with the lower surface of the base.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 22 of Defendants' Request.”

B. “19. That prior to October 16, 1946, plaintiff did not have the entire title to the patent in suit.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 19 of Defendants' Request.”

A. “20. That the Patent Office rejected the following claims as lacking invention and the applicants Driggs and Faber of the patent in suit assented to such rejection and cancelled the following claims:

“1. A new article of manufacture for use as a flare shell comprising an apertured base having a tubular eyelet therein and an integral drawn wall of thinner section than the base,

Defendants' Exhibit G—(Continued)

said base and wall constituting a structure having a continuous, smooth exterior surface without shoulders.

“ 2. A new article of manufacture for use as a flare shell comprising an apertured base with a smooth exterior without shoulders and an integral drawn wall of thinner section than the base, said shell being formed of a one-piece drawn aluminum body.

“ 21. In a flare, the combination of a shell, a flare, a gas check, a folded parachute arranged longitudinally of said shell above said gas check, a closure for said shell on the other side of said parachute, and a wooden column interposed within said parachute between said gas check and closure to prevent the collapse thereof.

“ 35. In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein, and a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the cartridge case.

“ 36. In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein, a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the car-

Defendants' Exhibit G—(Continued)

tridge case, and a primer in the base in said cartridge case for igniting said means.

“‘38. In combination, a one-piece drawn shell case having an expelling charge and delay fuse in the base thereof, a gas-producing member attached to a parachute contained therein and ejectable therefrom by said expelling means, and a detachable cartridge case mounted on one end of the shell case having a propelling charge and primer therefor mounted therein.’”

(Answer.) “Plaintiff admits that the Patent Office rejected the claims quoted in paragraph 20 of Defendants' Request for Admissions and admits that said claims were cancelled * * *.”

B. “21. That the flare signal shown in Fig. 1 of the patent in suit cannot be discharged from a hand gun of the type shown in Fig. 8 by the action of the trigger, hammer and associated firing pin 37.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 21 of Defendants' Request for Admissions, * * *.”

B. “22. That the length of the projectile case or shell of the flare signal described and claims in patent No. 1,947,834 is not stated in the specification and claims—

“(a) —in inches;

“(b) —in millimeters;

“(c) —in any unit of measurement.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 22 of Defendants' Request.”

Defendants' Exhibit G—(Continued)

B. "23. That the length of the cartridge case of the flare signal described and claimed in patent No. 1,947,834 is not stated in the specification and claims of the patent—

- "(a) —in inches;
- "(b) —in millimeters;
- "(c) —in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 23 of Defendants' Request."

B. "24. That the thickness of the base of (1) the cartridge case and (2) the projectile case of the flare signal is not stated in the specification and claims of patent No. 1,947,834—

- "(a) —in inches;
- "(b) —in millimeters;
- "(c) —in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 24 of Defendants' Request."

B. "25. That the thickness of the walls of the cartridge case or shell is not stated in the patent in suit in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 25 of Defendants' Request."

B. "26. That the thickness of the walls of the projectile shell or case is not stated in the patent in suit in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 26 of Defendants' Request."

B. "27. That the outer diameter, inner diameter, and thickness of the wooden spacer block or

Defendants' Exhibit G—(Continued)
ring identified by numeral 7 in the patent in suit are
not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 27 of Defendants' Request."

B. "28. That the length and diameter of the
case 9 containing the flare 10 referred to in the
patent in suit are not stated in any unit of measure-
ment."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 28 of Defendants' Request."

B. "29. That the size of the parachute 20 is
not stated in the patent in suit in any unit of
measurement."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 29 of Defendants' Request."

B. "30. That the stick or column identified by
numeral 21 is a means to prevent collapse of the
parachute."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 30 of Defendants' Request."

B. "31. That the length and diameter of stick
or column 21 referred to in the patent in suit are
not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 31 of Defendants' Request."

B. "32. That the diameter and thickness of the
washer 17 referred to in the patent in suit are not
stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set
forth in paragraph 32 of Defendants' Request."

B. "33. That factors which affect the total

Defendants' Exhibit G—(Continued)

length of a projectile case include the following—

“(a) —character and quantity of powder or other expelling charge required to eject the contents of the projectile case;

“(b) —the character and composition of the flare;

“(c) —the length of time the flare is to burn;

“(d) —the size of the parachute used;

“(e) —the desired rate of descent of the flare;

“(f) —the number and thickness of the washers and gas checks employed;

“(g) —the height to which the projectile case is to be shot before ejection of its contents.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 33 of Defendants' Request * * *.”

D. “1. Shall the defendant rely, during the trial of this cause, upon the sample, Plaintiff's Exhibit 2, made a part of the Bill of Complaint, as exemplary of the signal flares allegedly manufactured and sold by defendant?”

(Answer.) “Answering Defendants' interrogatory 1, Defendant shall rely, during the trial of this cause, upon the sample, Plaintiff's Exhibit No. 2, made a part of the Bill of Complaint, * * *.”

D. “3. Does the flare signal, Plaintiff's Exhibit

Defendants' Exhibit G—(Continued)

2, filed with the complaint herein, include any one or more of the following:

“(a) —a case having a threaded base end;

“(b) —a one-piece cup having a thin side wall formed in annular threads;

“(c) —a one-piece circular shell open at either end;

“(d) —a shell having a restricted base with threads pressed therein.”

(Answer.) “The answer to Defendants' interrogatory 3 is ‘no’.”

B. “1. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant does not contain or include a cartridge case or shell having a base with an annular groove.”

(Answer.) “Plaintiff admits that when the words ‘annular groove’ are interpreted in their narrowest sense, Plaintiff's Exhibit 2 upon which Plaintiff will rely as exemplary of signal flares manufactured and sold by Defendant, does not contain or include a cartridge case having a base with an annular groove, * * *.”

B. “2. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant does not contain or include an aluminum case with a detachable metallic closure for the open end thereof.”

(Answer.) “Plaintiff admits that Plaintiff's Exhibit 2 does not contain or include a detachable

Defendants' Exhibit G—(Continued)

metallic closure for the open end of the aluminum case of said exhibit, * * *.”

B. “16. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant is clearly and legibly marked with the legend 'Mfg. by Signal Mfg. Co., L. A. Calif.' at two separate places.”

(Answer.) “Plaintiff admits that Plaintiff's Exhibit 2 is marked circumferential at the upper end 'Mfg. by Signal Mfg. Co., L. A. Calif.' and circumferential at the lower end 'Signal Mfg. Co., L. A., Calif.' * * *.”

A. “19. That it is common in the pyrotechnic art to apply the color to the exterior housing or cover of an article or to a part thereof, such color conforming to the color of the contents of such pyrotechnic article.”

(Answer.) “Plaintiff admits the allegations of Defendants' paragraph 19 * * *.”

B. “12. That patent No. 79,963 issued in 1868 teaches that the color of the light produced by a pyrotechnic device 'may be indicated by the paper wad or cap by which it is confined.'”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 12 of Defendants' Second Request for Admissions.”

A. “15. That the diameter of signal flare cartridges and projectiles used in signal flares is established by specifications issued by the United States Coast Guard.”

(Answer.) “Plaintiff admits that the diameter

Defendants' Exhibit G—(Continued)
of the signal flare cartridges and projectiles used in signal flares is now controlled by specifications issued by the United States Coast Guard * * *.”

A. “16. That a signal flare for use in a signal pistol must be of a diameter and cross-sectional form adapted to enter and reasonably fit the dimensions of the bore and chamber of such pistol.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 16 of Defendants' Request.”

A. “17. That the chamber and bore dimensions of signal pistols are established by specifications issued by the United States Coast Guard.”

(Answer.) “Plaintiff admits that at the present time specifications are issued by the United States Coast Guard with respect to the chamber and bore dimensions of signal pistols * * *.”

B. “15. That 'General Rules and Regulations for Vessel Inspection' issued by the United States Coast Guard in August, 1943, included the following requirements—

“(a) —that parachute signal cartridges contain a projectile which will give forth a brilliant red flare of not less than 20,000 candle power, capable of being projected to a height of not less than 150 feet and of not less than 30 seconds burning duration;

“(b) —the dimensions of the barrel and chamber of the pistol;

“(c) —the signal cartridges shall be capable of fitting into and firing from a pistol

Defendants' Exhibit G—(Continued)

bored and chambered in conformity with the dimensions given;

“(d) —that all pistols and cartridges be marked with the name and address of the manufacturer and the date of manufacture.”

(Answer.) “Plaintiff admits the allegations set forth in (a), (b), (c) and (d) of paragraph 15 of Defendants' Second Request for Admissions.”

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 114, inclusive, contain the original Bill of Complaint; Answer; Plaintiff's Answer to Defendants' Second Request for Admissions; Stipulation; Order Allowing Filing of Second Amended Answer and Counterclaim; Second Amended Answer and Counterclaim; Answer to Defendants' Counterclaim; Defendants' Objections to and Revisions of Findings of Fact and Conclusions of Law as proposed by Plaintiff; Petition for Rehearing; Plaintiff's Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law; Plaintiff's Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Interlocutory Judgment; Injunction; Notice of Appeal; Statement of Points on Appeal;

Designation of Record on Appeal; Stipulation and Order Extending Time to File Counter-Designation of Record; Order Extending Time to Docket Appeal; Designation of Additional Portions of Record on Appeal and Stipulation and Order Correcting Reporter's Transcript and a full, true and correct copy of minute order entered December 29, 1950, which, together with copy of Reporter's Transcript of Proceedings on December 13, 1948; October 31, November 1, 2 and 3, 1950, and January 8, 1951, and original Plaintiff's Exhibits 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 21, 22, 22a, 23, 24, 25, 26, 27, 28 and 31, and original Defendants' Exhibits A, B, E, F-1 to F-32, G, H-A, H-B, K-1 and K-2, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 4th day of April, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12892. United States Court of Appeals for the Ninth Circuit. Signal Manufacturing Company and Charles Schneider, Appellants, vs. The Kilgore Manufacturing Company, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,892

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
d.b.a. SIGNAL MANUFACTURING COM-
PANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Appellee.

NOTICE OF ADOPTION OF
STATEMENT OF POINTS

Appellants in the above-entitled cause hereby
formally adopt as their statement of points on
appeal under Rule 19(6) the concise statement of
defendants-appellants' points on appeal pursuant
to F.R.C.P. 75(d) starting on page 87 of the certi-
fied record on appeal on file herein.

Dated: April 10, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Appellants.

[Endorsed]: Filed April 11, 1951.